No. ____

IN THE

# Supreme Court of the United States

REMINGTON ARMS CO., LLC, ET AL.,
*Petitioners*,

v.

DONNA L. SOTO, ADMINSTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Connecticut**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Protection of Lawful Commerce in Arms Act ("PLCAA") "generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009). However, the PLCAA provides an exception for "action[s] in which a manufacturer or seller of a [firearm or ammunition] knowingly violated a State or Federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). "This exception has come to be known as the 'predicate exception.'" *Ileto*, 565 F.3d at 1132. Crucially, this predicate exception enumerates examples of covered statutes, and these examples specifically regulate the firearms industry. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

The Connecticut Supreme Court below held that the PLCAA's predicate exception encompasses all general statutes merely capable of being applied to firearms sales or marketing. In contrast, both the Second and Ninth Circuits have rejected this broad interpretation of the predicate exception, which would swallow the PLCAA's immunity rule. *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 402-403 (2d Cir. 2008); *Ileto*, 565 F.3d at 1134, 1136. And the Ninth Circuit interpreted the predicate exception even more narrowly than the Second Circuit. See *ibid.*

The question presented is whether the PLCAA's predicate exception encompasses alleged violations of broad, generally applicable state statutes, such as the Connecticut Unfair Trade Practices Act, which forbids "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a).

## PARTIES TO THE PROCEEDINGS

1. Petitioners, Remington Arms Company, LLC and Remington Outdoor Company, Inc., were defendants in the trial court and appellees below.

2. The following parties, respondents on review, were plaintiffs in the trial court and appellants below: Donna L. Soto, administratrix of the estate of Victoria L. Soto; Ian Hockley and Nicole Hockley, co-administrators of the estate of Dylan C. Hockley; David C. Wheeler, administrator of the estate of Benjamin A. Wheeler; Mary D'Avino, administratrix of the estate of Rachel M. D'Avino; Mark Barden and Jacqueline Barden, co-administrators of the estate of Daniel G. Barden; William D. Sherlach, as executor of the estate of Mary Joy Sherlach and in his individual capacity; Neil Heslin and Scarlett Lewis, co-administrators of the estate of Jesse McCord Lewis; Leonard Pozner, administrator of the estate of Noah S. Pozner; and Gilles J. Rousseau, administrator of the estate of Lauren G. Rousseau. Natalie Hammond was also a plaintiff in the trial court, but was not a party to the appeal below. See App., *infra*, 3a n.2.

3. Camfour, Inc., Camfour Holding, Inc., Riverview Sales, Inc., and David LaGuercia were defendants in the trial court and appellees below. Plaintiffs voluntarily withdrew the action as to these defendants-appellees on April 8, 2019.

4. Bushmaster Firearms, Bushmaster Firearms Inc., Bushmaster Firearms International, LLC, Bushmaster Holdings, LLC, and Freedom Group, Inc. were also named as defendants below. Those entities no longer exist. Petitioner Remington Outdoor Company, Inc. was formerly known as Freedom Group, Inc., and Bushmaster Firearms International, LLC was merged into and exists only as a brand owned by petitioner Remington Arms Company, LLC.

## CORPORATE DISCLOSURE STATEMENT

1. There is no publicly held company that owns 10% or more of the stock of Remington Arms Company, LLC. Remington Arms Company, LLC is a Delaware limited liability company. Remington Arms Company, LLC's sole member is FGI Operating Company, LLC ("FGI Operating"), a Delaware limited liability company. FGI Operating's sole member is FGI Holding Company, LLC ("FGI Holding"), a Delaware limited liability company. FGI Holding's sole member is Remington Outdoor Company, Inc., a Delaware corporation.

2. Remington Outdoor Company, Inc. is a Delaware corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

## DIRECTLY RELATED CASES

1. This case arises out of trial court proceedings in *Soto* v. *Bushmaster Firearms International, LLC*, No. FBT-CV-15-6048103-S (Conn. Super. Ct.), before the Superior Court of Connecticut, Judicial District of Fairfield at Bridgeport. On October 14, 2016, the superior court struck the amended complaint. On November 18, 2016, the superior court entered judgment.

2. The superior court's decision was appealed to the Supreme Court of Connecticut, which entered judgment on March 19, 2019 in *Soto* v. *Bushmaster Firearms International, LLC*, Nos. SC 19832, SC 19833 (Conn.). On May 1, 2019, the Connecticut Supreme Court stayed further proceedings pending this Court's review.

3. Previously, the trial court case was removed to the U.S. District Court for the District of Connecticut. See *Soto* v. *Bushmaster Firearms Int'l, LLC*, No. 3:15-cv-00068-RNC (D. Conn.). The district court remanded the case to state court on October 16, 2015.

4. There are no other directly related cases within the meaning of this Court's Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Remington Arms Company, LLC and Remington Outdoor Company, Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut.

## OPINIONS BELOW

The Supreme Court of Connecticut's opinion, App., *infra*, 1a-155a, is reported at 202 A.3d 262. The superior court's decision to strike the amended complaint, App., *infra*, 156a-217a, is unreported, but is available at 2016 WL 8115354.

## STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on March 19, 2019. On May 17, 2019, Justice Ginsburg extended the time in which to file a petition for a writ of certiorari to and including August 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See infra* p. 30-31.

## STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 220a-231a.

## INTRODUCTION

Congress enacted the Protection of Lawful Commerce in Arms Act ("PLCAA") to ensure that firearms—so central to American society that the Founders safeguarded their ownership and use in the Bill of Rights—would be regulated only through the democratic process rather than the vagaries of litigation. Congress passed the PLCAA in 2005 in response to a wave of lawsuits seeking to hold firearms manufacturers and sellers liable "for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3).

Although those lawsuits were largely unsuccessful on the merits, Congress found that the mere "possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, * * * threatens the diminution of a basic constitutional right and civil liberty, invites the dissembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system * * *, and constitutes an unreasonable burden on interstate and foreign commerce." 15 U.S.C. § 7901(a)(6). In other words, this flood of litigation put the firearms industry "in danger of being overwhelmed by the cost of defending itself." H.R. Rep. No. 109-124, at 12 (2005). Congress therefore granted manufacturers and sellers broad immunity from lawsuits seeking damages and other relief "resulting from the criminal or unlawful misuse" of firearms by third parties. 15 U.S.C. § 7903(5)(A).

Immunity under the PLCAA is subject to certain limited exceptions. One such exception allows actions to proceed where a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of [a firearm or ammunition]," and the

violation proximately caused the plaintiff's harm. 15 U.S.C. § 7903(5)(A)(iii). This is known as the "predicate exception" because liability requires a knowing violation of a "predicate statute." *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008).

By a 4-3 margin, the Connecticut Supreme Court gave the predicate exception such a broad reading that it threatens to swallow the PLCAA's immunity rule. Over a vigorous dissent, that court wrote that the predicate exception's text is most naturally read to encompass any statute merely "capable of being applied" to firearms sales or marketing. App., *infra*, 62a-63a. This interpretation has been rejected by every federal court of appeals to address the question, and the Second Circuit described it as "a far too-broad reading" that "would allow the predicate exception to swallow the statute." *City of New York*, 524 F.3d at 403. Furthermore, the Connecticut Supreme Court held that the predicate exception encompasses alleged violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), a sweeping prohibition on "unfair or deceptive acts or practices in the conduct of *any* trade or commerce." Conn. Gen. Stat. § 42-110b(a) (emphasis added). In addition to conflicting with the Second Circuit's analysis in *City of New York*, the decision is irreconcilable with the Ninth Circuit's holding and analysis in *Ileto* v. *Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). *Ileto* found it "likely that Congress had in mind only * * * statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry," and concluded that the PLCAA preempts "general tort theories of liability" regardless of whether they are codified. *Id.* at 1136.

This Court's review is urgently needed. As the Connecticut Supreme Court acknowledged, courts have faced profound "difficulties * * * in attempting to distill a

clear rule or guiding principle from the predicate exception." App., *infra*, 105a. The decision below dramatically exacerbates confusion over the predicate exception's scope and creates a clear split of authority.

It is also plainly wrong. This case is an *archetypical* example of the kind of lawsuit Congress sought to preempt, raising claims indistinguishable from those routinely asserted in the pre-PLCAA litigation that drove Congress to respond. The PLCAA's operative text, Congress's findings and purposes, and the PLCAA's legislative history all point to one conclusion: General unfair trade practices laws like CUTPA are not encompassed by the predicate exception.

Because all states have analogous unfair trade practices laws, the decision below threatens to unleash a flood of lawsuits nationwide that would subject lawful business practices to crippling litigation burdens. This Court must intervene now to resolve the deep conflict over the predicate exception's scope, correct the Connecticut Supreme Court's misreading of the PLCAA, and prevent a renewed wave of lawsuits of precisely the kind Congress sought to preempt.

## STATEMENT OF THE CASE

### A. Federal Protection Of Lawful Commerce In Arms

1. Enacted in 2005, "[t]he PLCAA generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto*, 565 F.3d at 1131. "The PLCAA was considered and passed at a time when victims of shooting incidents, as well as municipalities * * *, brought civil suits seeking damages and injunctive relief against out-of-state manufacturers and sellers of firearms." Vivian S. Chu, Cong. Research Serv., R42871, *The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers* 1 (2012), https://bit.ly/2IfFZnE. These lawsuits were founded on a variety of theories, including "strict liability for abnormally dangerous activities," "strict product liability for defective design," "negligent marketing," "public nuisance," and "deceptive trade practices." Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries*, 65 Mo. L. Rev. 1, 6-50 (2000).

The unifying theme of these disparate theories of liability was an attempt to hold "manufacturers, distributors, dealers, and importers of firearms" liable for "harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Some of those lawsuits were brought by victims of crimes committed with firearms, including several mass shootings. See, *e.g.*, *Ileto*, 565 F.3d at 1130; *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997); *Merrill* v. *Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001). Others were brought by municipalities and officials. See, *e.g.*, *City of New York*, 524 F.3d at 388-389; *Ganim* v. *Smith & Wesson Corp.*, 780 A.2d 98, 101-102 (Conn. 2001).

These lawsuits were generally unsuccessful on the merits.[1] Nonetheless, "the claims were still damaging to the gun industry." Recent Legislation, *Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-02, 119 Stat. 2095 (2005)*, 119 Harv. L. Rev. 1939, 1940 (2006). Some "municipal leaders pressed on regardless of their chance of success, spending taxpayers' money in a war of attrition against the firearms industry." *Ibid.* Cases commonly dragged on for years with onerous discovery and lengthy trials. See, *e.g.*, *Hamilton* v. *Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *NAACP* v. *AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003). As a result, the industry was "in danger of being overwhelmed by the cost of defending itself against these suits." H.R. Rep. No. 109-124, at 12 (2005).

2. a. In response, Congress enacted the PLCAA. Congress found that firearms are already "heavily regulated under Federal, State, and local laws," 15 U.S.C. § 7901(a)(4), and that lawful manufacturers and sellers "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products," *id.* § 7901(a)(5). Finding that the Second Amendment protects an individual right to keep and bear arms, *id.* §§ 7901(a)(1)-(2); accord *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008), Congress concluded that lawsuits seeking to hold law-abiding firearms manufacturers and sellers liable for third-party

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[1] See, *e.g.*, Timothy D. Lytton, Suing the Gun Industry 5 (Timothy D. Lytton ed., 2005) ("The great majority [of such lawsuits] have been dismissed or abandoned prior to trial, and of the few favorable jury verdicts obtained by plaintiffs, all but one have been overturned on appeal."); Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 Brook. L. Rev. 681, 681 (1997) (noting widespread failure of suits).

criminal acts are "an abuse of the legal system" and "threaten[] the diminution of a basic constitutional right and civil liberty." 15 U.S.C. § 7901(a)(6). Congress acted to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce," *id.* § 7901(b)(4); to preserve citizens' "access to a supply of firearms and ammunition for all lawful purposes," *id.* § 7901(b)(2); and to protect the rights of citizens under the Fourteenth Amendment, *id.* § 7901(b)(3); accord *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010). Additionally, Congress acted to protect the First Amendment rights of firearms manufacturers and sellers, 15 U.S.C. § 7901(b)(5)—rights that are implicated by the marketing claims here.

b. The text of the PLCAA broadly provides that a "civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm or ammunition] product * * * for damages * * * or other relief, resulting from the criminal or unlawful misuse of [the] product by the person or a third party" "may not be brought in any Federal or State court." 15 U.S.C. §§ 7902(a), 7903(5)(A); see *id.* § 7903(4). Any actions pending on the PLCAA's enactment date "shall be immediately dismissed." *Id.* § 7902(b).

This broad immunity is subject to certain limited exceptions. See 15 U.S.C. § 7903(5)(A)(i)-(vi). For example, the PLCAA permits actions "against a seller for negligent entrustment or negligence per se." *Id.* at § 7903(5)(A)(ii).

As relevant here, the PLCAA permits "action[s] in which a manufacturer or seller of a [firearm or ammunition] knowingly violated a State or Federal statute *applicable to the sale or marketing* of the product, and the violation was a proximate cause of the

harm for which relief is sought." *Id.* § 7903(5)(A)(iii) (emphasis added). This exception "has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim," but also "a knowing violation of a 'predicate statute,'" *Ileto*, 565 F.3d at 1132—that is, a statute "applicable to the sale or marketing of [firearms]," 15 U.S.C. § 7903(5)(A)(iii).

The PLCAA expressly describes two types of claims that come within the predicate exception: First, where the manufacturer or seller knowingly falsified or failed to keep "record[s] required to be kept under Federal or State law with respect to the [firearm or ammunition]," or was involved in making a false statement with regard to the lawfulness of a firearms transfer. 15 U.S.C. § 7903(5)(iii)(I); see 18 U.S.C. § 922(m). Second, where the manufacturer or seller "aided, abetted, or conspired" to sell a firearm or ammunition that it knew or had reasonable cause to know the "actual buyer * * * was prohibited from possessing" under federal law. 15 U.S.C. § 7903(5)(iii)(II); see 18 U.S.C. §§ 922(g), (n).

**B. Factual And Procedural History**

1. In December 2012, twenty-year-old Adam Lanza shot and killed his mother Nancy, and then he drove to Sandy Hook Elementary School in Newtown, Connecticut, where he shot and killed twenty first-grade children and six adults, and wounded two other staff members before taking his own life. See App., *infra*, 1a. The Sandy Hook shooting shocked the country, and multiple states, including Connecticut, enacted new gun-control legislation. See *N.Y. State Rifle & Pistol Ass'n* v. *Cuomo*, 804 F.3d 242, 247-251 (2d Cir. 2015).

Lanza carried out the attack primarily with a Bushmaster XM-15 rifle that his mother Nancy lawfully purchased in March 2010. App., *infra*, 10a. The XM-15 is a version of the AR-15 rifle, "the best-selling rifle type in

the United States." Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue*, 60 Hastings L.J. 1285, 1296 (2009); see *Heller* v. *District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("[I]n 2007," AR-15 rifles "accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market."). AR-15 rifles are popular for hunting and home defense, and they are "the leading type of firearm used in" competitions such as "national matches * * * sponsored by the congressionally established Civilian Marksmanship Program." *Shew* v. *Malloy*, 994 F. Supp. 2d 234, 245 n.40 (D. Conn. 2014), *rev'd in part on other grounds sub nom. N.Y. State Rifle & Pistol Ass'n* v. *Cuomo*, 804 F.3d 242.

2. In December 2014, family members of several of the Sandy Hook victims brought suit in Connecticut state court against the rifle's manufacturer (Remington), its wholesale distributor, and its retail seller, seeking damages and unspecified injunctive relief. App., *infra*, 3a-4a & nn.3-5.[2] "The gravamen of [respondents'] claims, which [were] brought pursuant to the state's wrongful death statute," was that the defendants "(1) negligently entrusted to civilian consumers an AR-15 style assault rifle that is suitable for use only by military and law enforcement personnel, and (2) violated the Connecticut Unfair Trade Practices Act (CUTPA), through the sale or wrongful marketing of the rifle." *Id.* at 4a-5a (footnotes and citation omitted).

The primary thrust of respondents' complaint was that "the AR-15 * * * is 'grossly ill-suited' for legitimate civilian purposes," and that "any commercial sale of [such rifles] to civilian users" should be deemed "negligent en-

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[2] One of the surviving victims was also named as a plaintiff, but she later abandoned her claims. App., *infra*, 3a n.2.

trustment" or "an unfair trade practice" *per se*. App., *infra*, 11a, 24a, 79a-80a. Respondents contended that "the AR-15 is a military grade weapon" and "the risks associated with selling the weapon to the civilian market far outweigh any potential benefits." *Id.* at 11a.

The complaint also alleged that Remington "knowingly marketed, advertised, and promoted" the rifle "for civilians to use to carry out offensive, military style combat missions against their perceived enemies." App., *infra*, 2a. Purported examples of such allegedly "unethical, oppressive, immoral and unscrupulous" marketing included advertisements connecting the rifles to the military by picturing a soldier against the backdrop of an American flag; featuring the slogan "[w]hen you need to perform under pressure, Bushmaster delivers"; describing one Bushmaster model (not the XM-15) as "the ultimate combat weapons system"; and using the phrase, "[f]orces of opposition, bow down." *Id.* at 12a-13a.[3] The complaint also alleged that Remington "further promoted" the XM-15 as a "combat weapon" by designating a 30-round magazine—which was lawful in Connecticut in 2012—as a "standard" accessory in catalogues. *Id.* at 12a.

Respondents claimed that Remington's marketing violated CUTPA—a general unfair trade practices law that, like similar laws in other states,[4] broadly forbids "unfair competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). Respondents did not allege that

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[3] The advertisements containing these images and slogans are appended to Remington's motion for stay in the Connecticut Supreme Court. See Remington Defs.' Conn. S. Ct. Mot. to Stay, Ex. A (Apr. 5, 2019).

[4] See generally Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* (Mar. 2018), https://bit.ly/2K8eaMe.

either Adam or Nancy Lanza saw any of the referenced advertisements or catalogues. But the complaint referred to Adam Lanza's general interest in the military and violent videogames, and it made the bare allegation that he chose the XM-15 from his mother's firearms collection "not only for its functional capabilities," but "also because of its marketed association with the military." App., *infra*, 13a.

3. The superior court struck the complaint for failure to state a claim. App., *infra*, 216a-217a. It concluded that respondents' negligent entrustment allegations failed under both state law and the federal PLCAA. *Id.* at 217a. While the court determined that CUTPA qualified as a law "applicable to the sale or marketing of [firearms]" under the predicate exception, *id.* at 198a-199a, it also held that respondents failed to state a valid CUTPA claim because they alleged no business relationship with the defendants and thus lacked standing to assert their claim. *Id.* at 201a.

4. a. By a 4-3 margin, the Connecticut Supreme Court affirmed in part and reversed in part. Like the superior court, it rejected respondents' negligent entrustment claims on state-law grounds. App., *infra*, 14a-24a. But the Connecticut Supreme Court disagreed with the superior court that respondents were required to allege a business relationship to state a CUTPA claim. *Id.* at 27a-40a. The court concluded that respondents' "first theory of CUTPA liability—that the sale of AR-15s to the civilian population is ipso facto unfair"—was "barred under the CUTPA statute of limitations." *Id.* at 27a & 8a n.14. However, the court held that respondents' "alternative" theory that the XM-15 was "advertis[ed] and market[ed] * * * in an unethical, oppressive, immoral, and unscrupulous manner" was timely. *Id.* at 26a-27a, 45a-47a. Although the court acknowledged that proving the requisite "causal link" between Remington's advertising and the

"lethality of the Sandy Hook massacre" may "prove to be a Herculean task," it concluded that respondents had standing to proceed on their wrongful advertising theory. *Id.* at 38a-39a.

b. The court then turned to the dispositive question of federal law: whether "CUTPA qualifies as * * * a predicate statute, that is, a 'statute *applicable* to the sale or marketing of [firearms]'" within the meaning of the PLCAA. App., *infra*, 60a (quoting 15 U.S.C. § 7903(5)(A)(iii)) (emphasis in original).

A bare majority of four justices concluded that CUTPA—a general unfair trade practices statute of "broad scope," App., *infra*, 31a-32a—qualifies as a PLCAA predicate statute. The majority concluded that "the principal definition of 'applicable' is simply '[c]apable of being applied.'" *Id.* at 62a (citation omitted). And it noted that "[t]he only state appellate court to have reviewed the predicate exception construed it in this manner." *Ibid.* (citing *Smith & Wesson Corp.* v. *City of Gary*, 875 N.E.2d 422 (Ind. App. 2007)).

The majority acknowledged that "the defendants' interpretation" of the statutory text was "not implausible" and that other "dictionary definitions of 'applicable' might support a narrower reading" that would exclude CUTPA. App., *infra*, 61a-62a. But it reasoned that "[i]f Congress had intended to limit the scope of the predicate exception to violations of statutes that are *directly*, *expressly*, or *exclusively* applicable to firearms," it could have explicitly "used such language." *Id.* at 63a.

The majority purported to find support in *City of New York*, 524 F.3d 384. There, the Second Circuit *rejected* the "capable of being applied" interpretation and held that the predicate exception did *not* encompass alleged violations of a New York public nuisance statute, which applied broadly to "unreasonable" conduct. *Id.* at

399, 403-404. But the Second Circuit also stated that the predicate "exception * * * encompass[es]" statutes that "courts have applied to the sale and marketing of firearms," or that "do not expressly regulate firearms but that clearly can be said to implicate the[ir] purchase and sale." *Id.* at 404. According to the majority below, CUTPA fit those categories, App., *infra*, 68a-69a, because CUTPA had long been applied to "wrongful advertising" under what the court called the "cigarette rule" (a reference to lawsuits over deceptive tobacco advertising), *id.* at 71a; and, in the majority's view, had been "applied to the sale of firearms," *id.* at 70a.

The majority acknowledged that, in *Ileto*, 565 F.3d 1126, "the Ninth Circuit ha[d] construed the predicate exception more narrowly than * * * the Second Circuit," and had held that the predicate exception did not encompass statutes codifying "general tort theories." App., *infra*, 69a n.47, 74a n.53. But the majority suggested that CUTPA "might * * * arguably qualif[y] as a predicate statute" under the Ninth Circuit's "more narrow[] * * * standards" because "CUTPA specifically regulates commercial sales activities and is, therefore, narrower in scope and more directly applicable than * * * general tort and nuisance statutes." *Id.* at 74a n.53.

The majority brushed aside the view of other courts and jurists that its "capable of being applied" interpretation would allow "the exception [to] swallow the rule," App., *infra*, 79a-80a (quoting *Ileto*, 565 F.3d at 1155 (Berzon, J., concurring in part and dissenting in part)); cf. *City of New York*, 524 F.3d at 403 (similar), noting that there still "must be at least a colorable claim that a defendant has, in fact, violated some statute," *id.* at 80a. While the majority "assume[d], without deciding," that the predicate exception might not "fully" encompass certain statutes that "reasonably might be implicated in any civil action arising from gun violence," it did not view

"[respondents]' wrongful marketing allegations" as falling within that narrow category. *Id.* at 80a-81a. It reasoned that the allegations against "one specific family of firearms sellers" in this case were sufficiently "narrowly framed" to "proceed without crippling PLCAA." *Id.* at 81a.

The majority nonetheless acknowledged that it was "possible that Congress intended to immunize firearms sellers" from claims of this kind. App., *infra*, 105a. It therefore suggested that "in light of the difficulties that the federal courts have faced in attempting to distill a clear rule or guiding principle from the predicate exception, Congress may wish to revisit the issue." *Ibid.*

c. Justice Robinson dissented, joined by Justices Vertefeuille and Elgo. They concluded that "the predicate exception encompasses only those statutes that specifically govern the sale and marketing of firearms and ammunition, as opposed to generalized unfair trade practices statutes" like CUTPA. App., *infra*, 112a.

The dissent determined that the PLCAA's "statutory text and legislative history" provided "no support" for the aspects of the Second Circuit's *City of New York* opinion on which the majority relied. App., *infra*, 120a-121a. It "decline[d] to follow the analysis of the Second Circuit's ultimately unpersuasive decision," considering its "expansive holding" to be "simply inconsistent" with the "the relevant statutory text and legislative history," which "suggests a narrower reading of th[e] exception." *Id.* at 120a-122a. The dissent found the Ninth Circuit's "more restrictive" analysis "more instructive." *Id.* at 123a & n.10.

The dissent reasoned that "[t]he very specific examples of firearms laws that Congress provides in the predicate exception strongly suggest that it intended only those statutes that are specific to the firearms trade to be

considered 'applicable to the sale or marketing of [firearms].'" App., *infra*, 130a (citation omitted). It noted that this understanding was supported by the legislative history, which contained explicit references to "deceptive marketing" and advertising-related lawsuits as among the types preempted. *Id.* at 138a & n.18 (emphasis omitted).

The dissent observed that Congress was especially "concern[ed] about vague standards." App., *infra*, 139a. And it rejected "the logic behind the majority's premise that Congress intended the [PLCAA] to preempt state common-law claims, but leave undisturbed even broader sources of liability under state unfair trade practice statutes like CUTPA." *Id.* at 147a n.21.

d. On Remington's motion, the Connecticut Supreme Court stayed its judgment pending this Court's review. App., *infra*, 218a-219a.

## REASONS FOR GRANTING THE PETITION

Courts of appeals have faced great "difficulties * * * attempting to distill a clear rule or guiding principle from the predicate exception," App., *infra*, 105a, about what laws qualify as "statute[s] applicable to the sale or marketing of [firearms]." 15 U.S.C. § 7903(5)(A)(iii). The resulting disarray has produced a broad range of irreconcilable interpretations of the exception's scope. The Connecticut Supreme Court deepened this division, adopting virtually wholesale the broadest possible interpretation of "capable of being applied"—which even the Second Circuit rejected as "a far too-broad reading," *City of New York*, 524 F.3d at 403, and which is utterly irreconcilable with the Ninth Circuit's *Ileto* decision. This division of authority is intolerable given Congress's "intention to create national uniformity" with the PLCAA, *Ileto*, 565 F.3d at 1136, and warrants this Court's immediate review.

This Court's guidance is sorely needed. As the dissenters below noted, lawsuits like this one are *precisely* the kind the PLCAA was enacted to prevent. The Connecticut Supreme Court's decision misreads the PLCAA's text and drastically undermines Congress's "manifest purpose," *United States* v. *Hayes*, 555 U.S. 415, 427 (2009)—to provide manufacturers broad immunity from liability for third-party criminal misuse of firearms, subject only to carefully limited exceptions.

The decision will have immediate and severe consequences, exposing the firearms industry to costly and burdensome litigation based on theories of liability virtually indistinguishable from those that motivated the PLCAA's enactment. States across the nation have broad consumer protection statutes comparable to CUTPA. Thus, as a leading scholar on firearm-manufacturer liability has explained, the decision below will "unleash a

flood of lawsuits across the country." Timothy D. Lytton, *Sandy Hook Lawsuit Court Victory Opens Crack in Gun Maker Immunity Shield*, Conversation (Mar. 15, 2019), https://bit.ly/2F44rEz (Lytton, *Sandy Hook Lawsuit*). Other courts are *already citing* the decision below to support sweeping liability. See *City of Gary* v. *Smith & Wesson Corp.*, No. 18A-CT-181, 2019 WL 2222985, at *13 (Ind. App. May 23, 2019) (citing decision in reaffirming broadest reading of predicate exception). The decision could easily prompt claims directed at all aspects of a firearm manufacturer's business activities—not just advertising, but product design, distribution, and sales.

Allowing this case simply to proceed will inflict on the firearms industry the very harm the PLCAA was meant to address—massive, unsustainable litigation expenses, which threaten to destroy an industry that makes lawful products whose possession and use the Constitution specifically protects. Only this Court's immediate review can avoid that consequence.

### A. The Decision Below Exacerbates An Acknowledged Division Of Authority

"[C]ourts have not coalesced around a single interpretation of the predicate exception." Sarah Herman Peck, Cong. Research Serv., LSB10292, *When Can the Firearm Industry Be Sued?* 5 (2019), https://bit.ly/2ZWZwyN. In *Ileto,* 565 F.3d 1126, the Ninth Circuit "construed the predicate exception more narrowly" than the Second Circuit did in *City of New York*, 524 F.3d 384. App., *infra*, 69a n.47. Tellingly, each of those decisions issued over a vigorous dissent regarding both the exception's overall scope and its application to the case at hand. The Connecticut Supreme Court further deepened this division by reading the predicate exception even more broadly than the Second Circuit—once again, in a sharply divided decision

eliciting a vigorous dissent. And it created a clear split of authority, reaching a decision irreconcilable with *Ileto*.

1. In *City of New York*, the Second Circuit addressed the applicability of the predicate exception to a state nuisance statute prohibiting "unreasonable" conduct that "creates or maintains a condition which endangers [public] safety or health." 524 F.3d at 399 & n.1 (citation omitted). The court determined that the word "applicable" could not, in context, be interpreted simply to mean "capable of being applied," which would result in "a far too-broad reading" that "would allow the predicate exception to swallow the statute." *Id.* at 403.

But the Second Circuit then "decline[d] to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 400. The court held that the exception encompasses statutes that (1) "expressly regulate firearms," (2) "courts have applied to the sale and marketing of firearms," or (3) "do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *Id.* at 404. Noting that that the nuisance law at issue there was "a statute of general applicability that has never been applied to firearms suppliers for conduct like that complained of by the City," it held the predicate exception inapplicable. *Id.* at 399, 404.

Judge Katzmann dissented. He concluded that "the word 'applicable'" unambiguously means "capable of being applied." *Id.* at 405 (Katzmann, J., dissenting). He took issue with the majority's apparent reliance on how courts had applied state liability statutes in the past, which he characterized as both nonsensical and arbitrary, *id.* at 406-407, and objected that "the majority's unclear language and rationale" left "future courts * * * without

guidance" about the scope of the predicate exception, *id.* at 406.

The Ninth Circuit addressed a nearly identical question in *Ileto*: whether the predicate exception encompassed California negligence and nuisance statutes. 565 F.3d at 1132-1133. The Ninth Circuit also squarely rejected the "all-encompassing" "capable of being applied" interpretation. *Id.* at 1133-1134. However, unlike the Second Circuit, the Ninth Circuit gave no weight to how a particular state statute had been applied in the past. It interpreted the word "applicable" in light of the "illustrative predicate statutes" provided in the exception's text, as well as Congress's statement of findings and purposes. *Id.* at 1134.

Judge Graber, joined by Judge Reinhardt, thus concluded it was "more likely that Congress had in mind *only* * * * statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry." *Id.* at 1136 (emphasis added). And the majority held that "Congress intended to preempt * * * general tort theories of liability" regardless of whether they were statutorily codified. *Ibid.* The majority observed that the statutes at issue were "subject to the same 'judicial evolution' as ordinary common-law claims," and that such "'judicial evolution' was precisely the target of the PLCAA." *Ibid.* (citing 15 U.S.C. § 7901(a)(7)).

Judge Berzon dissented in relevant part. She too found it "clear" that "the predicate exception cannot possibly encompass *every* statute that might be 'capable of being applied' to the sale or manufacture of firearms"—an "exception [that] would swallow the rule." *Id.* at 1155 (Berzon, J., concurring in part and dissenting in part). Nevertheless, she took issue with the majority's "conclu[sion] that Congress likely had only [a] narrow

subset of laws (apparently, firearm-specific laws and regulations) in mind when drafting the predicate exception." *Id.* at 1159. Judge Berzon embraced a third reading instead: that the predicate exception encompasses "statutes capable of being applied to the sale or marketing of firearms," but *only* when "litigants * * * allege that defendants 'knowingly violated' those statutes," *id.* at 1159-1160 (quoting 15 U.S.C. § 7903(5)(A)(iii))—even if the statutes themselves do not "require[] knowing conduct," *id.* at 1156.

The confusion over the predicate exception does not end there. In *City of Gary*, 875 N.E.2d 422—which the majority below cited favorably—the Indiana Court of Appeals "conclude[d] that the predicate exception is unambiguous," *id.* at 434, endorsed the "capable of being applied" interpretation, *id.* at 431 (citation omitted), and allowed a lawsuit alleging violations of Indiana's public nuisance statute to proceed. Although arguably dicta, that court has since reaffirmed its broad reading, citing the decision below. See *City of Gary* v. *Smith & Wesson Corp.*, No. 18A-CT-181, ---N.E.3d---, 2019 WL 2222985, at *13. This plainly conflicts with the Second and Ninth Circuits' interpretations. See *Ileto*, 565 F.3d at 1135 n.5 (discussing *City of Gary*).

The decision below deepens the division. The Connecticut Supreme Court adopted the maximalist "capable of being applied" interpretation that the Second and Ninth Circuits rejected, but which Judge Katzmann and the Indiana Court of Appeals embraced. App., *infra*, 62a-63a. The majority below declined to recognize *any* further limiting principle, dismissing concerns that its decision would "swallow the rule" by observing that "there must be at least a colorable claim" that "some statute" was violated. *Id.* at 80a.

2. Seeking to downplay the conflict and insulate this case from review, the Connecticut Supreme Court half-heartedly asserted that CUTPA "might * * * arguably" qualify as a predicate statute under *Ileto*. App., *infra*, 74a n.53. But the decision below directly conflicts with the Ninth Circuit's holding and analysis, which extends "the predicate exception" *only* to "firearm-specific laws and regulations." *Ileto*, 565 F.3d at 1155, 1159 (Berzon, J., concurring in part and dissenting in part) (discussing majority opinion). And *Ileto* squarely held that "Congress intended to preempt general tort theories of liability" whether statutorily codified or not, emphasizing Congress's textually manifest purpose to foreclose common-law-style "judicial evolution." *Id.* at 1136.

Just like the statutes in *Ileto*, CUTPA imposes broad civil liability under an "elusive * * * standard of fairness." *Associated Inv. Co.* v. *Williams Assocs. IV*, 645 A.2d 505, 511 (Conn. 1994) (quoting *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)). Just like the statutes in *Ileto*, "CUTPA * * * establish[es] a fairness standard designed to grow and broaden * * * to meet circumstances as they arise," *ibid.* (internal quotation marks omitted)—making it "subject to the same 'judicial evolution' as ordinary common-law claims" that "w[ere] precisely the target of the PLCAA," *Ileto*, 565 F.3d at 1136. And just like the statutes in *Ileto*, CUTPA is not remotely comparable to the highly specific "illustrative predicate statutes" Congress provided, *id.* at 1134, such as record-keeping laws for firearms sales.

Largely relying on a sentence fragment plucked from the Ninth Circuit's discussion of legislative history, the majority below attempted to distinguish CUTPA from "the general tort and nuisance statutes" in *Ileto* on the grounds that it "specifically regulates commercial sales activities and is, therefore, narrower in scope." App., *infra*, 74a n.53. That distinction does not hold water. To

be sure, the Ninth Circuit suggested the predicate exception might include not only statutes that "pertain exclusively to the firearms industry," but may also encompass certain other laws that "pertain specifically to sales and manufacturing activities." *Ileto*, 565 F.3d at 1134. But even if the Ninth Circuit contemplated including laws besides those *exclusively* applicable to firearms, it would sweep no more broadly than provisions comparable to Congress's highly specific "illustrative predicate statutes." *Ibid.* As both the majority and the dissent below recognized, CUTPA is not *remotely* "of that same ilk." App., *infra*, 84a; see also *id.* at 127a (Robinson, J., dissenting in part).

The majority's characterization of CUTPA as somehow "narrower in scope" than the "general tort * * * statutes" at issue in *Ileto*, App., *infra*, 74a n.53, is likewise without merit. By the majority's own admission, CUTPA is a law of "broad scope and remedial nature," *id.* at 31a-32a, applying general fairness standards to any and all "acts or practices in the conduct of any trade or commerce," Conn. Gen. Stat. § 42-110b(a). The majority emphasizes that CUTPA "specifically regulates commercial sales activities," App., *infra*, 74a n.53, but that is a meaningless limitation in this context. *Every* lawsuit the PLCAA was intended to preempt would target commercial activities. In fact, "CUTPA's standard for liability" is *more* "flexible" than "common law tort principles," *Sportsmen's Boating Corp.* v. *Hensley*, 474 A.2d 780, 787 (Conn. 1984), which the Ninth Circuit found preempted in *Ileto*. Furthermore, "the private cause of action under CUTPA * * * provides a remedy for a *wider* range of business conduct than does the common law." *Associated Inv. Co.*, 645 A.2d at 512 (emphasis added).

While the Ninth Circuit placed some weight on the fact that "members of Congress had referenced" *Ileto* itself "as an example of [a lawsuit] that PLCAA would

preclude," App, *infra*, 69a n.47 (citing *Ileto*, 565 F.3d at 1137), that is no distinction. Although the PLCAA's legislative history contains no reference to this case (filed nine years after its enactment), it has the next closest thing: specific references to the City of Bridgeport's lawsuit against firearms manufacturers for "unfair and deceptive advertising under CUTPA." *Ganim*, 780 A.2d at 112-113. See 151 Cong. Rec. 17,371 (statement of Sen. Sessions) (2005); H.R. Rep. No. 109-124, at 8-9 (2005) (report for virtually identical predecessor bill). There is no way to reconcile the decision below with *Ileto*.

**B. The Decision Below Is Wrong**

The decision below is also plainly wrong. The PLCAA's text, Congress's express statement of purpose and findings, and the legislative history all point to the same conclusion: General unfair trade practices laws like CUTPA are not encompassed within the PLCAA's predicate exception.

1. In analyzing the predicate exception, "the beginning point must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). As a general matter, the word "applicable" can either mean "[c]apable of being applied" or—especially in reference to "a rule, regulation, law, etc."—"affecting or relating to a *particular* person, group, or situation; having *direct relevance*." Black's Law Dictionary 120 (10th ed. 2014) (emphases added). Both senses are common in "everyday usage." *Ileto*, 565 F.3d at 1133-1134 & n.4.

The majority below found the broader "capable of being applied" definition more plausible, noting that Congress *could* have explicitly employed narrowing language. App., *infra*, 62a-63a. But it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be

determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). Here, *every* contextual indicator supports a narrower reading that would exclude generic unfair trade practices laws like CUTPA.

Congress provided specific examples of statutes "applicable" to firearms sales or marketing, "both of which specifically relate to firearms." App., *infra*, 84a-85a & n.61. A narrower reading is therefore supported "by the commonsense canon of *noscitur a sociis*." *United States* v. *Williams*, 553 U.S. 285, 294 (2008). Indeed, if Congress had used the word "applicable" so broadly as to encompass even laws that apply generic fairness standards to any and all commercial activity, "there would be no need to list examples at all," *Ileto*, 565 F.3d at 1134; the specific examples would be "superfluous," *Obduskey* v. *McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019).[5]

More fundamentally, construing the predicate exception to include any statute capable of being applied to firearms "would frustrate Congress' manifest purpose," *Hayes*, 555 U.S. at 427, "allow[ing] the predicate exception to swallow the statute," *City of New York*, 524 F.3d at 403, and making a hash of the PLCAA's primary provision. It would effectively rewrite the PLCAA's preemption of a broad range of "civil action[s] or proceeding[s] or * * * administrative proceeding[s]" for "any relief" (including "fines" or "penalties"), 15 U.S.C. § 7903(5)(A), into a limited bar on certain claims

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[5] The majority also erred by relying on the principle that federal statutes should not be construed to supersede historic state police powers unless Congress's purpose to do so is clear. See App., *infra*, 82a-84a. That presumption has no application where, as here, the *entire purpose* of the legislation is to "pre-empt state-law causes of action." *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009).

grounded solely in the common law. This interpretation renders much of Congress' basic definition of covered "civil liability action[s]" inoperative, Accord *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 171 n.6 (D.C. 2008); in fact, it would even render some of the other *exceptions* largely or wholly superfluous, such as the exception for "negligence per se," 15 U.S.C. § 7903(5)(A)(ii). See Restatement (Third) of Torts § 14.

Yet the majority below adopted the "capable of being applied" interpretation virtually wholesale. Its sole gesture toward a limiting principle was to "assume, without deciding" that the predicate exception might not "fully" encompass certain statutes broad enough to "be implicated in *any civil action arising from gun violence*." App., *infra*, 80a (emphasis added). The majority did not even attempt to locate a basis for that *ad hoc* (and extraordinarily narrow) limitation in the PLCAA's text. Ultimately, even this meager and hypothetical limitation was too much for the majority below. Recognizing that CUTPA itself is a statute that "reasonably might be implicated" in "virtually any action seeking to hold firearms sellers liable for third-party gun violence," *ibid.*, the majority concluded that the "proper lens" through which to analyze the predicate exception was "whether a statute is applicable to the sale or marketing of firearms *as applied to the particular circumstances of the case at issue*," *id.* at 80a n.57 (emphasis added). The idea appears to be the application of the predicate exception will turn on how "narrowly" the theory of liability is "framed" in a particular case, *id.* at 81a—an approach that would allow plaintiffs to easily plead around the PLCAA's provisions.

2. Interpreting the predicate exception to include broad unfair trade practices laws like CUTPA makes a mockery of Congress's stated purpose and findings. Congress found that "[l]awsuits have been commenced"

against firearms companies "seek[ing] money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals," 15 U.S.C. § 7901(a)(3)—that is, lawsuits precisely like this one. And it found—contrary to the theories advanced in those lawsuits—that firearm companies "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse" firearms. *Id.* at § 7901(a)(5). To be sure, the PLCAA recognizes some exceptions. But Congress does not "hide elephants in mouseholes," *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)—such as by using ambiguous language to exempt claims under broad unfair trade practices laws existing in all 50 states.

As the Ninth Circuit noted in *Ileto*, Congress was *particularly* concerned with vague standards subject to "judicial evolution." 565 F.3d at 1136. Congress intended to foreclose the risk that "a maverick judicial officer or petit jury" might "expand civil liability" in unexpected ways. 15 U.S.C. § 7901(a)(7). Congress acted to prevent such unanticipated "expan[sion] [of] civil liability." *Ibid.* This goal would be eviscerated by exempting state unfair trade practices laws that, like CUTPA, invite "application of broadly defined * * * and 'elusive * * * standard[s] of fairness,'" *Associated Inv. Co.*, 645 A.2d at 511 (quoting *Sperry & Hutchinson*, 405 U.S. at 244)—and that are, if anything, "broader" and "more flexible" than the common law, *id.* at 510-511. It defies reason that "Congress intended * * * to preempt state common-law claims, but leave undisturbed even broader sources of liability under state unfair trade practice statutes." App., *infra*, 147a n.21 (Robinson, J., dissenting in part). This lawsuit is particularly antithetical to Congress's purpose because it employs a broad and vague state statute to penalize *advertising* when Congress explicitly sought to

protect manufacturers and sellers' "right[s] under the First Amendment." 15 U.S.C. § 7901(b)(5).

3. The legislative history eliminates any doubt. The lawsuits the PLCAA was enacted to address commonly included claims of negligent, unfair, or deceptive advertising, as well as claims under state unfair trade practices statutes. See, *e.g.*, *McCarthy* v. *Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) (negligent advertising), *aff'd sub nom. McCarthy* v. *Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Merrill*, 28 P.3d at 121, 130-132 (negligent/unlawful advertising); *People* v. *Arcadia Machine & Tool, Inc.*, No. 4095, 2003 WL 21184117, at *7 (Cal. Super. Ct. Apr. 10, 2003) (advertising-based claims under California's Unfair Competition Law), *aff'd sub nom. In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 663-664, 667-668 (Cal. Ct. App. 2005); *Ganim* v. *Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909, at *1 (Conn. Super. Ct. Dec. 10, 1999) (deceptive advertising and unfair sales practices claims under CUTPA), *aff'd* 780 A.2d 98 (Conn. 2001); *City of Gary ex rel. King* v. *Smith & Wesson Corp.*, 801 N.E.2d 1222, 1247 (Ind. 2003) (deceptive advertising); *City of Boston* v. *Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *3 (Mass. Super. Ct. July 13, 2000) (false and deceptive advertising).

*Every one* of those lawsuits is referenced in the legislative history. See, *e.g.*, H.R. Rep. No. 109-124, at 6 n.1, 7 n.15, 8-9 & n.36, 11 n.48 (2005) (citing all lawsuits above);[6] 151 Cong. Rec. 23,279 (2005) (statement of Rep. Stearns) (citing *City of Gary*). During the debates, Senator Hatch specifically criticized lawsuits "citing

[6] House Report 109-124 concerned H.R. 800, a bill of the same name that "contain[ed] the same legal reform provisions [as] * * * S. 397," 151 Cong. Rec. 23,261 (2005) (statement of Rep. Sensenbrenner), the bill that was ultimately passed into law.

*deceptive marketing*" and "claim[ing] that sellers *give the false impression* that gun ownership enhances personal safety." 151 Cong. Rec. 18,073 (2005) (emphases added). Most tellingly, Senator Sessions singled out the City of Bridgeport's lawsuit against firearm makers—which asserted, among other claims, a cause of action "for unfair and deceptive advertising *under CUTPA*," *Ganim*, 780 A.2d at 112 (emphasis added)—as an example of a lawsuit that would not be permitted to go forward. 151 Cong. Rec. 17,371 (2005); accord H.R. Rep. No. 109-124, at 8-9 & n.36 (discussing *Ganim*).

### C. This Case Is An Attractive Vehicle To Resolve An Important And Recurring Issue

1. a. The importance of this issue cannot be overstated. "Every state has consumer protection statutes more-or-less like Connecticut's." Nora Freeman Engstrom & David M. Studdert, *Stanford Law Professors on the Lawsuit Against Gun Manufacturers in the Wake of the Sandy Hook Massacre*, Stanford Law School (Mar. 14, 2019), https://stanford.io/2XYOEyS. The decision below thus threatens to "create a substantial opening in the immunity firearm manufacturers" have under the PLCAA. *Ibid.* It provides a veritable "'how-to' guide" for "[o]ther states [to] use their own unfair trade practices laws" and "a blueprint for overcoming * * * the PLCAA." John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, Politico (Mar. 18, 2019), https://politi.co/2YnZj6S.

As a leading academic scholar on firearms liability concluded, it is "likely that gun violence victims will bring similar claims elsewhere," using the decision below as a template, to "potentially unleash a flood of lawsuits across the country." Lytton, *Sandy Hook Lawsuit*, https://bit.ly/2F44rEz. Nor would such lawsuits be limited to "unfair advertising" claims. CUTPA and other

state unfair trade practices laws broadly prohibit "unfair" or "deceptive" acts or practices, encompassing a multitude of "distinct legal theories," App., *infra*, 80a n.57, effectively indistinguishable from pre-PLCAA lawsuits. See, *e.g.*, *Ganim*, 780 A.2d at 112-113 (alleging CUTPA violations for, among other things, "unfair and deceptive advertising" of handguns, "fail[ing] to incorporate feasible safety devices," and "sell[ing] excessive numbers of guns").

Private lawsuits are just the beginning. "To appreciate the wider import" and "possible far-reaching implications" of the decision below," one must recognize that consumer protection laws like CUTPA provide state attorneys general with sweeping authority, such as the power to bring "suit[s] for damages, declaratory and injunctive relief." Heidi Li Feldman, *Why the Latest Ruling in the Sandy Hook Shooting Litigation Matters*, Harv. L. Rev. Blog (Mar. 18, 2018), https://bit.ly/2GSu104. This decision thus revives the "scenario of many states, municipalities, and individuals pursuing gun industry actors through [unfair or deceptive acts and practices] provisions." *Ibid.* The availability of lawsuits seeking retrospective liability under vague and evolving fairness standards in even a single state will create heavy "burdens on the interstate market" for firearms, and impose *de facto* gun-control "policy choice[s] on neighboring States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 571 (1996); accord 15 U.S.C. § 7901(a)(8) (finding that firearms lawsuits "undermin[e] * * * comity between the sister States"). The impact on the firearms industry of even a few courts following the Connecticut Supreme Court would be profound.

b. "Regulation can be as effectively exerted through an award of damages as through * * * preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S.

236, 247 (1959). "For some plaintiffs and their attorneys, filing lawsuits against the gun industry represents a way to pursue gun control without having to face the obstacles of legislative politics." Timothy D. Lytton, Suing the Gun Industry at 154. This case illustrates the point. The crux of respondents' complaint was that "the AR-15 * * * is 'grossly ill-suited' for legitimate civilian purposes." App., *infra*, 11a. And respondents' brief below criticized the supposedly "impotent regulatory scheme" that "fails to mandate" stricter gun control. Pls.' Ct. S. Ct. Br. 8.

Congress enacted the PLCAA to prevent such impact litigation, see 15 U.S.C. § 7901(a)(8), which it viewed as an "abuse of the legal system," *id.* § 7901(a)(6), that threatened citizens' access to "firearms and ammunition for all lawful purposes," *id.* § 7901(b)(2). See also, *e.g.*, 151 Cong. Rec. 23,261 (2005) (statement of Rep. Sensenbrenner) (describing lawsuits as "attempts to accomplish through litigation what has not been achieved by legislation"). The decision below opens the door for a renewed campaign of nationwide litigation inviting courts to decide contentious gun-policy issues under indeterminate common-law-style standards.

2. a. That the decision below did not end trial-court litigation here is no barrier to this Court's jurisdiction. Under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975), this Court deems a judgment final under 28 U.S.C. § 1257(a) when (1) "the federal issue has been finally decided in the state courts," (2) "the party seeking review here might prevail on the merits on nonfederal grounds," insulating the federal issue from further review, (3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (4) "a refusal immediately to review the state-court decision might seriously erode federal policy." See also *Fort Wayne Books, Inc.* v.

*Indiana*, 489 U.S. 46, 54-57 (1989); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988).

This case perfectly fits those criteria. First, the Connecticut Supreme Court finally decided the federal issue—whether CUTPA qualifies as a "statute applicable to the sale or marketing of [firearms]" under the PLCAA. 15 U.S.C. § 7903(5)(A)(iii). Second, Remington might prevail on nonfederal grounds: notably, its advertising may not be found wrongful under CUTPA, or respondents may be unable to prove the causal link between the allegedly wrongful advertising and the harms suffered—an undertaking the court below acknowledged "may prove to be a Herculean task." App., *infra*, 38a. If so, the Connecticut Supreme Court's construction of the PLCAA would be insulated from federal review. See *Cox*, 420 U.S. at 482; *Michigan* v. *Long*, 463 U.S. 1032, 1037-1039 (1983). Third, reversal on the issue would extinguish respondents' last surviving claim, "preclu[ding] * * * further litigation." *Cox*, 420 U.S. at 482-483.

Finally, and critically, refusal to immediately review the state-court decision would "seriously erode federal policy." *Cox*, 420 U.S. at 483. This is no ordinary PLCAA case: It is widely recognized as a bellwether for the future of firearms litigation nationwide. See *supra* pp. 28-29. This Court has *never* addressed the PLCAA, including the predicate exception. And the Connecticut Supreme Court's decision marks the first time a state court of last resort (or a federal court of appeals) has held that a state law of general applicability—let alone one with close analogues across the nation—would qualify as a predicate statute. "[A] failure to decide the question now will leave the [firearms industry] operating in the shadow" of that decision for years. *Cox*, 420 U.S. at 486. Indeed, plaintiffs have *already* relied on the Connecticut Supreme Court's decision arguing for a broad reading of

the predicate exception. See Appellant's Notice of Additional Authority, *City of Gary* v. *Smith & Wesson Corp.*, No. 18A-CT-181 (Ind. App. May 20, 2019).

"Delaying final decision of the [PLCAA issue] until after trial," *Cox*, 420 U.S. at 485-486, is unacceptable. Congress enacted the PLCAA not simply to ensure that manufacturers would escape final judgments imposing liability for third-party crimes; Congress sought to address the crippling effects of *litigation*—"liability actions commenced * * * by" governmental and private plaintiffs, which it viewed as unfounded and abusive. 15 U.S.C. § 7901(a)(7). Congress wanted "[t]o prevent the use of *such lawsuits* to impose unreasonable burdens on" lawful commerce in arms. *Id.* at § 7901(b)(4) (emphasis added); cf., *e.g.*, 151 Cong. Rec. 18,942 (2005) (statement of Sen. Santorum) ("[T]hese suits—even while unsuccessful—drain significant resources from these companies * * *. We cannot allow this trend to continue.").

The PLCAA's text thus focuses not on substantive rules of liability, but rather on which "action[s] may not be brought," 15 U.S.C. § 7902(a), and mandates that covered lawsuits pending on the PLCAA's enactment date "shall be immediately dismissed," *id.* § 7902(b); see 151 Cong. Rec. 23,279 (2005) (statement of Rep. Stearns) ("One of the primary purposes of this legislation is to not force defendants to incur the additional costs and delay of filing motions and arguing, and certainly not to go through costly trial and appeals of cases that the bill requires to be dismissed forthwith."); accord 151 Cong. Rec. 19,135 (2005) (statement of Sen. Craig) (similar).

Given the PLCAA's clear policy, there is no question that "identifiable federal statutory * * * policies" would "be[] undermined by the continuation of the litigation in the state courts." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981)

(per curiam). Another decision allowing this Court to review the predicate exception may take years if it *ever* arrives. Either way, Remington would irreparably lose the intended benefit of the PLCAA's threshold immunity from suit. The burdens of discovery alone would be severe. And defendants in lawsuits seeking to apply the Connecticut Supreme Court's unprecedented holding to other states' unfair trade practices statutes would face the same burdens. Only immediate review can prevent those harms.

b. Finally, this case is an especially attractive vehicle for resolving the widespread confusion over the predicate exception. The Connecticut Supreme Court clearly understood the high stakes, and both the majority and the dissent exhaustively analyzed the PLCAA's text, purposes, and legislative history in thorough opinions reaching opposite conclusions, separated by a single vote. The superior court resolved the case on the pleadings, so there are no disputed factual issues. And because further state-court proceedings are stayed pending this Court's review, there is no risk that the dispute would become moot. See App., *infra*, 218a-219a. This is a uniquely suitable opportunity for this Court to resolve a recurring issue of undoubted national importance on which the lower courts are deeply divided.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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## APPENDIX A

**Supreme Court of Connecticut.**

Donna L. SOTO, Administratrix (Estate of Victoria L. Soto), et al.

v.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, et al.

(SC 19832), (SC 19833)

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Argued November 14, 2017

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Officially released March 19, 2019

PALMER, J.

On December 14, 2012, twenty year old Adam Lanza forced his way into Sandy Hook Elementary School in Newtown and, during the course of 264 seconds, fatally shot twenty first grade children and six staff members, and wounded two other staff members. Lanza carried out this massacre using a Bushmaster XM15-E2S semiautomatic rifle that was allegedly manufactured, distributed, and ultimately sold to Lanza's mother by the various defendants' in this case. There is no doubt that Lanza was directly and primarily responsible for this appalling series of crimes. In this action, however, the plaintiffs—administrators of the estates of nine of the decedents—contend that the defendants' also bear some of the blame. The plaintiffs assert a number of different legal theories as to why the defendants' should be held partly responsible for the tragedy. The defendants'

counter that all of the plaintiffs' legal theories are not only barred under Connecticut law, but also precluded by a federal statute, the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109-92, 119 Stat. 2095 (2005), codified at 15 U.S.C. §§ 7901 through 7903 (2012), which, with limited exceptions, immunizes firearms manufacturers, distributors, and dealers from civil liability for crimes committed by third parties using their weapons. See 15 U.S.C. §§ 7902 (a) and 7903 (5) (2012).

For the reasons set forth in this opinion, we agree with the defendants' that most of the plaintiffs' claims and legal theories are precluded by established Connecticut law and/or PLCAA. For example, we expressly reject the plaintiffs' theory that, merely by selling semiautomatic rifles—which were legal at the time[1] —to the civilian population, the defendants' became responsible for any crimes committed with those weapons.

The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants' knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior. Following a scrupulous review of the text and legislative history of

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[1] Following the Sandy Hook massacre, the legislature added the Bushmaster XM15, among many other assault rifles, to the list of firearms the sale or transfer of which is prohibited in Connecticut. See Public Acts 2013, No. 13-3 No. 13-3, § 25, codified at General Statutes (2014 Supp.) § 53-202a (1) (B) (xxi).

PLCAA, we also conclude that Congress has not clearly manifested an intent to extinguish the traditional authority of our legislature and our courts to protect the people of Connecticut from the pernicious practices alleged in the present case. The regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers. Accordingly, on the basis of that limited theory, we conclude that the plaintiffs have pleaded allegations sufficient to survive a motion to strike and are entitled to have the opportunity to prove their wrongful marketing allegations. We affirm the trial court's judgment insofar as that court struck the plaintiffs' claims predicated on all other legal theories.

## I
## PROCEDURAL HISTORY

The plaintiffs brought the present action in 2014, seeking damages and unspecified injunctive relief.[2] The

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[2] The plaintiffs are Donna L. Soto, administratrix of the estate of Victoria L. Soto; Ian Hockley and Nicole Hockley, coadministrators of the estate of Dylan C. Hockley; David C. Wheeler, administrator of the estate of Benjamin A. Wheeler; Mary D'Avino, administratrix of the estate of Rachel M. D'Avino; Mark Barden and Jacqueline Barden, coadministrators of the estate of Daniel G. Barden; William D. Sherlach, executor of the estate of Mary Joy Sherlach; Neil Heslin and Scarlett Lewis, coadministrators of the estate of Jesse McCord Lewis; Leonard Pozner, administrator of the estate of Noah S. Pozner; and Gilles J. Rousseau, administrator of the estate of Lauren G. Rousseau. For convenience, we refer to these plaintiffs simply as "the decedents" with respect to claims brought by the administrators in their fiduciary capacity. We note that one administrator, William D. Sherlach, also filed suit in his individual capacity, seeking damages for loss of consortium. The parties have not specifically briefed and we do not separately address William D. Sherlach's loss of consortium claims in this opinion. We further note that Natalie Hammond, a staff member who was wounded in but

defendants' include the Bushmaster defendants' (Remington),[3] one or more of which is alleged to have manufactured the Bushmaster XM15-E2S semiautomatic rifle that was used in the crimes; the Camfour defendants',[4] distributors that allegedly purchased the rifle from Remington and resold it to the Riverview defendants'; and the Riverview defendants',[5] retailers that allegedly sold the rifle to Adam Lanza's mother, Nancy Lanza, in March, 2010.[6] The gravamen of the plaintiffs' claims, which are brought pursuant to this state's wrongful death statute, General Statutes § 52-555,[7] is that the defendants' (1) negligently entrusted to

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survived the attack, also was named as a plaintiff. Hammond has abandoned her claims and, therefore, is not a party to this appeal.

[3] The Bushmaster defendants' are Bushmaster Firearms; Bushmaster Firearms, Inc.; Bushmaster Firearms International, LLC; Remington Outdoor Company, Inc.; Remington Arms Company, LLC; Bushmaster Holdings, LLC; and Freedom Group, Inc.

[4] The Camfour defendants' are Camfour, Inc., and Camfour Holding, LLP, also known as Camfour Holding, Inc.

[5] The Riverview defendants' are Riverview Sales, Inc., and David LaGuercia.

[6] We will refer to Adam Lanza as Lanza and to Nancy Lanza as his mother.

[7] General Statutes § 52-555 provides in relevant part: "(a) In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of. . . ."

civilian consumers an AR-15 style assault rifle[8] that is suitable for use only by military and law enforcement personnel, and (2) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.,[9] through the sale or wrongful marketing of the rifle.

The defendants' moved to strike the plaintiffs' complaint, contending that all of the plaintiffs' claims are barred by PLCAA. The defendants' also argued that, to the extent that the plaintiffs' claims sound in negligent entrustment, the plaintiffs failed to state a legally valid negligent entrustment claim under Connecticut common law, and, to the extent that their claims are predicated on alleged CUTPA violations, they are legally insufficient because, among other things, (1) the plaintiffs lack standing to bring a CUTPA action, (2) the plaintiffs' claims are time barred by CUTPA's three year statute of limitations; see General Statutes § 42-110g (f); (3) personal injuries and death are not cognizable CUTPA damages, and (4) the plaintiffs' CUTPA claims are simply veiled product liability claims and, therefore, are barred by General Statutes § 52-572n (a), the

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[8] The parties and the amici disagree as to whether the term "assault rifle" is an appropriate moniker for this class of weapons. We use the term because it is how the General Assembly has chosen to refer to semiautomatic firearms. See General Statutes § 53-202a (1) (B) (xxi); see also *Merrill* v. *Navegar, Inc.*, 26 Cal. 4th 465, 470 n.3, 110 Cal. Rptr.2d 370, 28 P.3d 116 (2001) (term has become widely accepted in law).

[9] General Statutes § 42-110b (a) provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Other relevant provisions of CUTPA are set forth in part IV of this opinion.

exclusivity provision of the Connecticut Product Liability Act (Product Liability Act).[10]

In response, the plaintiffs argued that PLCAA does not confer immunity on the defendants' for purposes of this case because two statutory exceptions to PLCAA immunity—for claims alleging negligent entrustment (negligent entrustment exception)[11] and for claims alleging a violation of a statute applicable to the sale or marketing of firearms (predicate exception)[12] —apply to their claims. The plaintiffs further argued that, for various reasons, the defendants' state law negligent entrustment and CUTPA arguments were ill founded.

Although the trial court rejected most of the defendants' arguments, the court concluded that (1) the plaintiffs' allegations do not fit within the common-law tort of negligent entrustment, (2) PLCAA bars the plaintiffs' claims insofar as those claims sound in negligent entrustment, and (3) the plaintiffs lack standing to bring wrongful death claims predicated on CUTPA violations because they never entered into a business relationship with the defendants'. Accordingly, the court granted in their entirety the defendants' motions to strike the plaintiffs' amended complaint.

On appeal, the plaintiffs challenge each of those conclusions.[13] For their part, the defendants' contend, as

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[10] The referenced statutory provisions are set forth in part IV of this opinion.

[11] See 15 U.S.C. § 7903 (5) (A) (ii) (2012).

[12] See 15 U.S.C. § 7903 (5) (A) (iii) (2012). This exception has come to be known as the predicate exception because a plaintiff must allege a knowing violation of a predicate statute.

[13] The plaintiffs appealed to the Appellate Court from the judgment of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

alternative grounds for affirmance, that the trial court improperly rejected their other CUTPA arguments. We conclude that the majority of the plaintiffs' claims were properly struck insofar as those claims are predicated on the theory that the sale of the XM15-E2S rifle to Lanza's mother or to the civilian market generally constituted either negligent entrustment; see part III of this opinion; or an unfair trade practice. See part IV B of this opinion. We also conclude, however, that the plaintiffs have standing to prosecute their CUTPA claims under Connecticut law. See part IV A of this opinion. We further conclude that PLCAA does not bar the plaintiffs from proceeding on the single, limited theory that the defendants' violated CUTPA by marketing the XM15-E2S to civilians for criminal purposes, and that those

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We granted permission to thirteen groups to appear and file amicus curiae briefs in this appeal. Five of the amici have filed briefs in support of the defendants' position: (1) Connecticut Citizens Defense League, Inc.; (2) Connecticut Defense Lawyers Association; (3) Gun Owners of America, Inc., Gun Owners Foundation, United States Justice Foundation, The Heller Foundation, and Conservative Legal Defense and Education Fund; (4) National Rifle Association of America, Inc.; and (5) National Shooting Sports Foundation. Eight of the amici have filed briefs in support of the plaintiffs' position: (1) medical doctors Katie Bakes, William Begg, Barbara Blok, Kathleen Clem, Christopher Colwell, Marie Crandall, Michael Hirsh, Stacy Reynolds, Jeffrey Sankoff, and Comilla Sasson (physicians amici); (2) The Brady Center to Prevent Gun Violence; (3) CT Against Gun Violence and Tom Diaz; (4) Law Center to Prevent Gun Violence; (5) Newtown Action Alliance and the Connecticut Association of Public School Superintendents; (6) law professors Nora Freeman Engstrom, Alexandra D. Lahav, Anita Bernstein, John J. Donohue III, Michael D. Green, Gregory C. Keating, James Kwak, Douglas Kysar, Stephan Landsman, Anthony J. Sebok, W. Bradley Wendel, John Fabian Witt, and Adam Zimmerman; (7) the State of Connecticut and the Department of Consumer Protection; and (8) Trinity Church Wall Street.

wrongful marketing tactics caused or contributed to the Sandy Hook massacre.[14] See part V of this opinion. Accordingly, we affirm in part and reverse in part the judgment of the trial court and remand the case for further proceedings.

## II
## ALLEGED FACTS

Because we are reviewing the judgment of the trial court rendered on a motion to strike, we must assume the truth of the following facts, as alleged by the plaintiffs.[15] Lanza carried out the Sandy Hook massacre using a Bushmaster XM15-E2S rifle. That rifle is Remington's version of the AR-15 assault rifle, which is substantially similar to the standard issue M16 military service rifle used by the United States Army and other nations' armed forces, but fires only in semiautomatic mode.

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[14] Athough our conclusion that the plaintiffs' primary theory—that the legal sale of the AR-15 assault rifle to the civilian market constitutes an unfair trade practice—is barred by the relevant statute of limitations disposes of that theory; see part IV B of this opinion; we believe that that theory, if timely presented, also would be barred by PLCAA immunity and/or the Product Liability Act, General Statutes § 52-572n (a).

[15] The standard of review regarding motions to strike is well established. "A motion to strike attacks the legal sufficiency of the allegations in a pleading. . . . In reviewing the sufficiency of the allegations in a complaint, courts are to assume the truth of the facts pleaded therein, and to determine whether those facts establish a valid cause of action. . . . [I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Thus, we assume the truth of both the specific factual allegations and any facts fairly provable thereunder. . . . Because a motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court, our review of the court's ruling [on a motion to strike] is plenary." (Citations omitted; internal quotation marks omitted.) *Himmelstein* v. *Windsor*, 304 Conn. 298, 307, 39 A.3d 1065 (2012).

The AR-15 and M16 are highly lethal weapons that are engineered to deliver maximum carnage with extreme efficiency. Several features make these rifles especially well suited for combat and enable a shooter to inflict unparalleled carnage. Rapid semiautomatic fire "unleashes a torrent of bullets in a matter of seconds." The ability to accommodate large capacity magazines allows for prolonged assaults. Exceptional muzzle velocity makes each hit catastrophic. Indeed, the plaintiffs contend, bullets fired from these rifles travel at such a high velocity that they cause a shockwave to pass through the body upon impact, resulting in catastrophic injuries even in areas remote to the direct wound. Finally, the fact that the AR-15 and M16 are lightweight, air-cooled, gas-operated, and magazine fed, enabling rapid fire with limited recoil, means that their lethality is not dependent on good aim or ideal combat conditions.

These features endow the AR-15 with a lethality that surpasses even that of other semiautomatic weapons. "The net effect is more wounds, of greater severity, in more victims, in less time." That lethality, combined with the ease with which criminals and mentally unstable individuals can acquire an AR-15, has made the rifle the weapon of choice for mass shootings, including school shootings.

The particular weapon at issue in this case was manufactured and sold by the Bushmaster defendants'. Sometime prior to March, 2010, the Bushmaster defendants' sold the rifle to the Camfour defendants'. The Camfour defendants' subsequently sold the rifle to the Riverview defendants', who operate a retail gun store located in the town of East Windsor.

In March, 2010, Lanza's mother purchased the rifle from the Riverview defendants'. Lanza, who was

seventeen years old at the time, had expressed a desire to join the elite United States Army Rangers unit. His mother bought the rifle to give to or share with him in order to connect with him. However, when Lanza turned eighteen on April 22, 2010, he did not enlist in the military. Still, he gained unfettered access to a military style assault rifle.

Eight months later, on the morning of December 14, 2012, Lanza retrieved the rifle and ten 30 round magazines. Using a technique taught in the first person shooter video games that he played, he taped several of those magazines together to allow for faster reloading. He then drove to Sandy Hook Elementary School.

Just before 9:30 a.m., Lanza shot his way into the locked school using the XM15-E2S. He immediately shot and killed Mary Joy Sherlach as well as the school's principal. He subsequently shot and wounded two staff members.

Lanza next entered Classroom 8, where he used the rifle to kill two adults and fifteen first grade children, including five of the plaintiffs. Finally, he entered Classroom 10, where he used the rifle to kill two adults and five first grade children, including three of the plaintiffs. Nine children from Classroom 10 were able to escape when Lanza paused to reload with another magazine.

In total, the attack lasted less than four and one-half minutes, during which Lanza fired at least 154 rounds from the XM15-E2S, killing twenty-six and wounding two others.[16]

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[16] Although the plaintiffs do not specifically allege it, an investigation revealed that Lanza killed his mother in their home prior to the massacre and that the massacre ended when he took his own life in

The plaintiffs filed the present action in 2014 seeking damages and injunctive relief. Each of the counts in the operative first amended complaint is predicated on two distinct theories of liability. First, the plaintiffs contend that the AR-15 is a military grade weapon that is "grossly ill-suited" for legitimate civilian purposes such as self-defense and recreation. They also allege that the AR-15 has become the weapon of choice for mass shootings and, therefore, that the risks associated with selling the weapon to the civilian market far outweigh any potential benefits. The defendants' continued to sell the XM15-E2S despite their knowledge of these facts. Therefore, the plaintiffs contend, it was both negligent and an unfair trade practice for each of the defendants' to sell the weapon, knowing that it eventually would be purchased by a civilian customer who might share it with other civilian users.

The plaintiffs' second theory of liability is that the defendants' advertised and marketed the XM15-E2S in an unethical, oppressive, immoral and unscrupulous manner. They contend that the defendants' have sought to grow the AR-15 market by extolling the militaristic and assaultive qualities of their AR-15 rifles and, specifically, the weapon's suitability for offensive combat missions. The plaintiffs argue that the defendants' militaristic marketing reinforces the image of the AR-15 as a combat weapon that is intended to be used for the purposes of waging war and killing human beings.

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the school. Both of those killings apparently were carried out with other firearms and are not at issue in this case. See Division of Criminal Justice, State of Connecticut, Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012 (November 25, 2013) p. 2.

Consistent with that image, the defendants' further promoted the XM15-E2S as a combat weapon system by designating in their product catalogues that the rifle comes "standard" with a 30 round magazine which, the plaintiffs allege, differs from how the defendants' promote and sell rifles for legal civilian purposes such as hunting and sport shooting.[17]

The plaintiffs further contend that the defendants' unethically promoted their assault weapons for offensive, military style missions by publishing advertisements and distributing product catalogs that (1) promote the AR-15 as "the uncompromising choice when you demand a rifle as mission adaptable as you are," (2) depict soldiers moving on patrol through jungles, armed with Bushmaster rifles, (3) feature the slogan "[w]hen you need to perform under pressure, Bushmaster delivers," superimposed over the silhouette of a soldier holding his helmet against the backdrop of an American flag, (4) tout the "military proven performance" of firearms like the XM15-E2S, (5) promote civilian rifles as "the ultimate combat weapons system," (6) invoke the unparalleled

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[17] In addition to alleging that the defendants' promoted the XM15-E2S for illegal, offensive use by civilians, the plaintiffs contended in their briefs and at oral argument before this court that the defendants' marketing was unethical and unscrupulous insofar as they (1) marketed the weapon to unstable, or even mentally ill, teenaged boys who were likely to use the rifle to commit violent assaults, (2) attempted to circumvent firearms sales laws by marketing the weapon to legal buyers who would foreseeably provide them to family members who could not legally purchase such weapons, and (3) further promoted the weapons for offensive use by unstable young men by licensing them for placement in violent video games that promote illegal civilian uses of military type assault rifles. Because these legal theories are not clearly articulated in the operative complaint, however, we do not consider them for purposes of this opinion.

destructive power of their AR-15 rifles, (7) claim that the most elite branches of the United States military, including the United States Navy SEALs, the United States Army Green Berets and Army Rangers, and other special forces, have used the AR-15, and (8) depict a close-up of an AR-15 with the following slogan: "Forces of opposition, bow down. You are single-handedly outnumbered."

Finally, with respect to this second, wrongful marketing theory of liability, the plaintiffs contend that the defendants' marketing of the XM15-E2S to civilians for offensive assault missions was a substantial factor in causing the plaintiffs' injuries. Specifically, they contend that Lanza had dreamed as a child of joining the elite Army Rangers unit of the United States Army and was, therefore, especially susceptible to militaristic marketing. They further contend that he selected the XM15-E2S for his assault from among an arsenal that included various less lethal arms—at least three handguns, one shotgun, two bolt action rifles, and three samurai swords—and that he specifically chose the XM15-E2S not only for its functional capabilities, including its assaultive qualities and efficiency in inflicting mass casualties, but also because of its marketed association with the military.[18] Finally, they contend that Lanza was a devoted player of first person shooter games featuring variants of the XM15-E2S and that he employed techniques taught in those games to enhance the lethality of his assault on the school. In other words, the plaintiffs allege that the attack, had it

[18] Although the plaintiffs do not expressly allege it in their complaint, the physicians amici contend that, according to the medical literature, assault weapon advertisements may activate people who are predisposed to violence.

occurred at all, would have been less lethal and the carnage less grievous if Lanza had not been encouraged by the defendants' marketing campaign to select the XM15-E2S as his weapon of choice and taught by violent video games how to kill with it most efficiently. Additional facts and procedural history will be set forth as necessary.

## III
## NEGLIGENT ENTRUSTMENT

In opposition to the defendants' motions to strike, the plaintiffs argued that their claims were not barred by PLCAA because the claims are predicated on allegations of negligent entrustment and CUTPA violations, both of which satisfy statutory exceptions to PLCAA immunity. In this part of the opinion, we consider whether the trial court correctly concluded that the plaintiffs' claims were legally insufficient to the extent that those claims are predicated on a theory of negligent entrustment. The trial court concluded both that the plaintiffs had not sufficiently pleaded a cause of action in negligent entrustment under Connecticut common law and, in the alternative, that the plaintiffs' allegations did not satisfy PLCAA's statutory definition of negligent entrustment. See 15 U.S.C. § 7903 (5) (B) (2012).[19] The plaintiffs challenge both conclusions on appeal. Because we agree with the trial court that the plaintiffs have not pleaded a legally sufficient cause of action in negligent entrustment

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[19] Title 15 of the 2012 edition of the United States Code, § 7903 (5) (B), provides in relevant part: "[T]he term 'negligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others."

under our state's common law, we need not consider whether negligent entrustment claims must meet stricter requirements in order to satisfy the federal statutory exception.

The following additional procedural history is relevant to this issue. In response to the defendants' motions to strike, the plaintiffs argued that their claims are not precluded by PLCAA because each of their claims is predicated in part on a theory of negligent entrustment and PLCAA does not confer immunity on sellers of firearms in actions for negligent entrustment. See 15 U.S.C. § 7903 (5) (A) (ii) (2012).[20] In its decision granting the defendants' motions to strike, the trial court concluded that an action for negligent entrustment will lie only when the supplier of a dangerous instrumentality such as a firearm knows or has reason to know that the *direct entrustee* is likely to use the item unsafely. Because the plaintiffs did not allege that there was any specific reason to believe that the Camfour defendants' (as direct entrustees of the Remington defendants'), the Riverview defendants' (as direct entrustees of the Camfour defendants'), or Lanza's mother (as a direct entrustee of the Riverview defendants') was incompetent to operate the XM15-E2S or had a propensity to use the weapon in an unsafe manner, the court granted all of the defendants' motions to strike with respect to the plaintiffs' negligent entrustment theories of liability.

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[20] Title 15 of the 2012 edition of the United States Code, § 7903 (5) (A), provides in relevant part: "The term 'qualified civil liability action' . . . shall not include—

* * *

"(ii) an action brought against a seller for negligent entrustment. . . ."

We commence our review of this issue with a brief discussion of the history of and principles that animate the tort of negligent entrustment. The cause of action for negligent entrustment represents a departure from the general rule that an individual cannot be held liable for the conduct of others. It reflects a legitimate societal concern that a person in possession of a dangerous instrument should bear the responsibility of exercising care when entrusting that instrument to another, given the serious risk to society if items like firearms or automobiles should fall into unfit hands. See J. Fisher, Comment, "So How Do You Hold This Thing Again?: Why the Texas Supreme Court Should Turn the Safety off the Negligent Entrustment of a Firearm Cause of Action," 46 Tex. Tech. L. Rev. 489, 495, 501 (2014). The primary question that we must resolve is whether these principles apply only when the entrustor believes or has specific reason to believe that the *direct entrustee* is likely to use the item unsafely or, rather, whether they also apply when it is reasonably foreseeable that the entrustment ultimately will lead to injurious use, whether by the direct entrustee or by some unknown third party.[21] If the former, then the trial court properly found for the defendants' on this issue as a matter of law; if the latter, then the plaintiffs are correct that the plaintiffs' claim presents an issue of fact to be decided by a jury.

Although the idea that it may be wrong to entrust a weapon or other dangerous item to one likely to misuse it

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[21] As we explain hereinafter, there is, of course, a third option: it may be foreseeable that the direct entrustee will share the dangerous item with a specific, identifiable third party who is incompetent to use it safely. The present case does not require us to determine whether and when an action for negligent entrustment will lie under those circumstances, when the nexus between the entrustor and the ultimate user is less attenuated than it is in the present case.

is as old as civilization,[22] the common-law tort of negligent entrustment traces its origins to *Dixon* v. *Bell*, 105 Eng. Rep. 1023 (K.B. 1816). See B. Todd, "Negligent Entrustment of Firearms," 6 Hamline L. Rev. 467, 467 and n.1 (1983). In *Dixon*, the defendant sent a preadolescent girl to retrieve a loaded gun, resulting in the accidental shooting of the plaintiff's son. See *Dixon* v. *Bell*, supra, 1023. In upholding a verdict for the plaintiff that the defendant was liable for entrusting the girl with the care and custody of the weapon, the court recognized that "he well [knew] that the said [girl] was too young, and an unfit and improper person to be sent for the gun. . . . " *Id.*

American courts began applying the doctrine of negligent entrustment in the 1920s, following the advent of the mass produced automobile; see J. Fisher, supra, 46 Tex. Tech. L. Rev. 493; and Connecticut first recognized the common-law cause of action in *Turner* v. *American District Telegraph & Messenger Co.*, 94 Conn. 707, 110 A. 540 (1920). In that case, the defendant security company entrusted a loaded pistol to an employee who later instigated a fight with and ultimately shot the plaintiff, a customer's night watchman. *Id.*, at 708–11, 110 A. 540 (preliminary statement of facts). This court held that there was insufficient evidence to support a verdict for the plaintiff on his negligent entrustment claim because there was not "even a scintilla of evidence that the defendant had or ought to have had knowledge or even suspicion that [its employee] possessed any of the traits .

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[22] See, e.g., The Republic of Plato (H. Davis trans., M. Walter Dunne 1901) c. 5, p. 33 (arguing that, having taken temporary possession of weapons from friend who was then in his right mind, it would be unjust to return those weapons if friend, having since gone mad, demanded them back).

. . attributed to him by the plaintiff," including that "he was a reckless person, liable to fall into a passion, and unfit to be [e]ntrusted with a deadly weapon . . . ." *Id.*, at 716, 110 A. 540. "Without this vitally important fact," the court concluded, "the plaintiff's claim falls to the ground . . . ." *Id.*

Other Connecticut cases decided in the early twentieth century, although not always expressly resolved under the rubric of negligent entrustment, also suggested that a person can be held liable for third-party injuries resulting from another's use of a dangerous item only if the entrustment of that item was made with actual or constructive knowledge that misuse by the entrustee was foreseeable. In *Wood* v. *O'Neil*, 90 Conn. 497, 97 A. 753 (1916), for example, this court held that no cause of action in negligence could be maintained against the parents of a fifteen year old boy who accidentally shot a companion with a shotgun because the parents, in permitting the boy to use the gun, had no specific knowledge that he "was possessed of a marked careless disposition." *Id.*, at 500, 97 A. 753.

Subsequently, in *Greeley* v. *Cunningham*, 116 Conn. 515, 165 A. 678 (1933), we articulated the standards that govern a negligent entrustment action in the context of automobiles, which since has become the primary context in which such claims have arisen. See generally J. Fisher, supra, 46 Tex. Tech. L. Rev. 489. In *Greeley*, the plaintiff alleged that the defendant had been negligent in entrusting his car to an unlicensed driver, who subsequently caused an accident while attempting to pass the plaintiff's vehicle. See *Greeley* v. *Cunningham*, supra, at 517–18, 165 A. 678. "[Although] liability cannot be imposed [on] an owner merely because he [e]ntrusts his automobile] to another to drive [on] the highways,"

the court explained, "[i]t is . . . coming to be generally held that the owner may be liable for injury resulting from the operation of an automobile he loans to another when he knows or ought reasonably to know that *the one to whom he [e]ntrusts it* is so incompetent to operate it, by reason of inexperience or other cause, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others." (Emphasis added.) *Id.*, at 518, 165 A. 678. This court proceeded to set forth the elements of a cause of action sounding in negligent entrustment of an automobile: (1) the owner of an automobile entrusts it to another person (2) whom the owner knows or should reasonably know is so incompetent to operate it that injury to others should reasonably be anticipated, and (3) such incompetence results in injury. *Id.*, at 520, 165 A. 678.

Since this court decided *Wood*, *Turner*, and *Greeley*, it never has suggested that a cause of action for negligent entrustment—whether involving a vehicle, a weapon, or some other dangerous item—will lie in the absence of evidence that the direct entrustee is likely to use the item unsafely. Most jurisdictions that have recognized a cause of action in negligent entrustment likewise require that the actor have actual or constructive knowledge that the specific person to whom a dangerous instrumentality is directly entrusted is unfit to use it properly. See, e.g., J. Fisher, supra, 46 Tex. Tech. L. Rev. 496; B. Todd, supra, 6 Hamline L. Rev. 467; S. Beal, "Saving Negligent Entrustment Claims," Trial, February, 2007, p. 35.

In accordance with the majority view, this also is the rule set forth in the Restatement (Second) of Torts. Section 308 of the Restatement (Second) provides that "[i]t is negligence to permit a third person to use a thing . . . [that] is under the control of the actor, if the actor

knows or should know that *such person* intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others." (Emphasis added.) 2 Restatement (Second), Torts § 308, p. 100 (1965). Section 390, which further defines the tort of negligent entrustment, provides that "[o]ne who supplies. . . a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others . . . is subject to liability for physical harm resulting to them." 2 *id.*, § 390, p. 314; see also B. Todd, supra, 6 Hamline L. Rev. 467 and n.5. We take it as well established, then, that, in order to prove negligent entrustment, a plaintiff must demonstrate that (1) the defendant has entrusted a potentially dangerous instrumentality to a third person (2) whom the entrustor knows or should know intends or is likely to use the instrumentality in a manner that involves unreasonable risk of physical harm, and (3) such use does in fact cause harm to the entrustee or others.

The rule that a cause of action for negligent entrustment will lie only when the entrustor knows or has reason to know that the direct entrustee is likely to use a dangerous instrumentality in an unsafe manner would bar the plaintiffs' negligent entrustment claims. Specifically, there is no allegation in this case that there was any reason to expect that Lanza's mother was likely to use the rifle in an unsafe manner.[23]

The plaintiffs, recognizing that they cannot prevail under this rule, invite us to adopt a different framework,

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[23] The plaintiffs expressly disclaim any allegation that Riverview's employees were careless in their decision to sell the rifle to Lanza's mother.

one "that focuses on the existence of a nexus between the defendant and the dangerous user—rather than the number of steps between them . . . ." In other words, their proposal is that a party alleging negligent entrustment need prove only that it was reasonably foreseeable that, following the initial entrustment of a dangerous instrumentality, that instrumentality ultimately would come into the possession of someone who would use it in an unsafe manner. A jury could find that standard satisfied in this case, they contend, because (1) Remington allegedly marketed its assault rifles to young men who play violent, first person shooter video games and who, as a class, have a history of using such rifles in real mass shootings, and (2) there is evidence that individuals who legally purchase weapons such as the AR-15 often share the weapons with family members, including young men.

We decline the plaintiffs' invitation to stretch the doctrine of negligent entrustment so far beyond its historical moorings. We recognize that some of our sister state courts have permitted negligent entrustment actions to proceed when, although there was no indication that the direct entrustee was incompetent to use a dangerous item, there was reason to believe that the entrustee would in turn share the item with a *specific* third party who would misuse it. This has been the case, for example, when a parent or other agent purchased a weapon or vehicle for a child who was present at the place and time of sale.[24] We need not decide whether and

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[24] See, e.g., *Dillon* v. *Suburban Motors, Inc.*, 166 Cal.App.3d 233, 212 Cal. Rptr. 360, 362–67, cause dismissed, 218 Cal. Rptr. 584, 705 P.2d 1260 (Cal. 1985); *Semeniuk* v. *Chentis*, 1 Ill. App. 2d 508, 510, 117 N.E.2d 883 (1954); *Sickles* v. *Montgomery Ward & Co.*, 6 Misc. 2d 1000, 1001, 167 N.Y.S.2d 977 (1957); *Corey* v. *Kaufman & Chernick, Inc.*, 70 R.I. 27, 30–31, 36 A.2d 103 (1944).

to what extent Connecticut would recognize a cause of action for negligent entrustment under such circumstances, however, because, in the present case, the plaintiffs do not allege that any of the defendants' possessed any knowledge or had any specific reason to believe either that Lanza's mother would share the XM15-E2S with her son or that he was especially likely to operate it unsafely or illegally. In any event, the plaintiffs have failed to cite to a single case, from any jurisdiction, that allowed an action for negligent entrustment to proceed when the nexus between a manufacturer of a product and the person who ultimately used that product in an unsafe manner was as attenuated as it is in the present case.[25]

We also recognize that there is authority for the proposition that entrustment may be deemed negligent when the entrustor has no specific knowledge regarding the entrustee's personal competence or character but knows that the entrustee is a member of a class that is notoriously unfit to safely utilize the entrusted item. See

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[25] The plaintiffs have drawn our attention to several cases in which the dangerous instrumentality at issue was misused by someone other than the direct entrustee. In each of those cases, however, the defendants' had specific reason to know or believe that the direct entrustee should not be trusted with the instrumentality. See, e.g., *Collins* v. *Arkansas Cement Co.*, 453 F.2d 512, 513–14 (8th Cir. 1972) (defendant's employee who gave explosive to children had history of horseplay with such explosives); *LeClaire* v. *Commercial Siding & Maintenance Co.*, 308 Ark. 580, 581–82, 826 S.W.2d 247 (1992) (defendant knew that employee, who allowed another driver to use defendant's vehicle, leading to accident, had history of intoxication and moving violations); *Rios* v. *Smith*, 95 N.Y.2d 647, 653, 722 N.Y.S.2d 220, 744 N.E.2d 1156 (2001) (defendant knew that son often drove defendant's all-terrain vehicle [ATV] in unsafe manner and that son's friend, whose misuse of ATV injured plaintiff, was frequent visitor and previously had ridden ATV with son).

2 Restatement (Second), supra, § 308, comment (b), p. 100. The plaintiffs argue that we should apply that principle in this case because (1) gun buyers as a class are known to sometimes share their weapons with family members, including young males, and (2) young males, in turn, are known to sometimes use assault weapons to commit mass shootings. Once again, we decline the invitation to so dramatically expand the scope of negligent entrustment liability.

As we noted, the tort of negligent entrustment saw its florescence, if not its modern genesis, in the advent of the mass produced automobile. See B. Todd, supra, 6 Hamline L. Rev. 467; A. Cholodofsky, Note, "Torts: Does the Negligent Entrustment Doctrine Apply to Sellers?" 39 U. Fla. L. Rev. 925, 928 (1987). In some instances, a person may be unsuited to drive an automobile because he is reckless, or inebriated, or otherwise distinctly unfit to drive safely on the public roads. See *A. Cholodofsky*, supra, 926 and nn. 5–6. It also is a matter of common sense and common knowledge, however, that certain classes of people—e.g., young children and blind persons—are inherently unfit to drive.

Our laws recognize as much. See General Statutes § 14-36 (c) and (e) (establishing, among other things, age and vision screening requirements for motor vehicle operator's permit or license). Accordingly, one may be negligent for entrusting an automobile to such users even in the absence of any particular knowledge about their individual driving skills, experience, or temperament. A jury reasonably might conclude that the same is true with respect to firearms and other weapons and dangerous equipment. See B. Todd, supra, 468–69.

The plaintiffs' theory, however, is fundamentally different. They do not contend that all gun buyers such

as Lanza's mother, or young men such as Lanza, are incapable of safely operating an AR-15. The plaintiffs do not even contend that such users usually or even frequently operate such weapons unsafely or unlawfully. Rather, the plaintiffs contend that it is objectively unreasonable to legally sell an assault weapon to an adult buyer, for no other reason than that some small subset of buyers will share weapons with their young adult sons and some much smaller subset of young adult males will use those weapons to commit terrible, random crimes. The only plausible way to construe that claim—and we do not understand the plaintiffs to deny this—is that any commercial sale of assault weapons to civilian users constitutes negligent entrustment because the social costs of such sales outweigh the perceived benefits. Other courts have rejected such a theory, as do we. See, e.g., *McCarthy* v. *Sturm, Ruger & Co.*, 916 F. Supp. 366, 370 (S.D.N.Y. 1996), aff'd sub nom. *McCarthy* v. *Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Merrill* v. *Navegar, Inc.*, 26 Cal. 4th 465, 483–84, 110 Cal. Rptr.2d 370, 28 P.3d 116 (2001); see also *Phillips* v. *Lucky Gunner, LLC*, 84 F. Supp.3d 1216, 1226 (D. Colo. 2015) (rejecting theory that unmediated online sales of hazardous items represent negligent entrustment), appeal dismissed, United States Circuit Court of Appeals, Docket No. 15-1153 (10th Cir. July 21, 2015). Accordingly, the plaintiffs' action cannot proceed under the negligent entrustment exception to immunity under PLCAA.

## IV
## WRONGFUL DEATH AND CUTPA: ISSUES OF STATE LAW

We turn next to the question of whether the trial court properly granted the defendants' motion to strike the plaintiffs' wrongful death claims insofar as those

claims are predicated on alleged CUTPA violations. Because we have concluded that the plaintiffs have not pleaded a legally sufficient negligent entrustment claim under Connecticut common law, PLCAA will bar the present action unless (1) the plaintiffs have pleaded a cognizable CUTPA violation, and (2) CUTPA constitutes a predicate statute for purposes of 15 U.S.C. § 7903 (5) (A) (iii).

In their motions to strike, the defendants' argued, among other things, that (1) the plaintiffs' claims were barred by CUTPA's three year statute of limitations, (2) damages for personal injuries and death resulting therefrom are not cognizable under CUTPA, (3) the plaintiffs' CUTPA claims are precluded by the Product Liability Act; see General Statutes § 52-572n (a); and (4) CUTPA is not a valid predicate statute for purposes of PLCAA. The trial court rejected each of these arguments. The court agreed with the defendants', however, that CUTPA does not afford protection to persons who do not have a consumer or other commercial relationship with the alleged wrongdoer. Accordingly, the court concluded that the plaintiffs lacked standing to pursue wrongful death claims predicated on CUTPA violations.

On appeal, the plaintiffs contend that the trial court improperly struck their claims for lack of standing to pursue them under CUTPA. For their part, the defendants' claim that the trial court's judgment can be affirmed on the alternative ground that the court's other determinations were improper.

As an initial matter, we reiterate that the plaintiffs' CUTPA based wrongful death claims are predicated on at least two fundamentally distinct theories of liability. First, the plaintiffs contend that the defendants' violated

CUTPA by selling the XM15-E2S to the civilian market despite their knowledge that there is no legitimate civilian use for such a weapon, that assault weapons such as the AR-15 pose unreasonable risks when used by civilians, and that individuals unfit to operate such weapons likely would gain access to them. In other words, the plaintiffs allege, in essence, that any sale of any assault weapon to any civilian purchaser in Connecticut is, ipso facto, an unfair trade practice under CUTPA.

Second, the plaintiffs contend that the defendants' violated CUTPA by advertising and marketing the XM15-E2S in an unethical, oppressive, immoral, and unscrupulous manner that promoted illegal offensive use of the rifle. Specifically, they allege that the defendants':

- promoted use of the XM15-E2S for offensive, assaultive purposes—specifically, for "waging war and killing human beings"—and not solely for self-defense, hunting, target practice, collection, or other legitimate civilian firearm uses
- extolled the militaristic qualities of the XM15-E2S
- advertised the XM15-E2S as a weapon that allows a single individual to force his multiple opponents to "bow down"
- marketed and promoted the sale of the XM15-E2S with the expectation and intent that it would be transferred to family members and other unscreened, unsafe users after its purchase.

The plaintiffs further allege in this regard that such promotional tactics were causally related to some or all of the injuries that were inflicted during the Sandy Hook massacre.

For the reasons that follow, we conclude that the trial court improperly granted the defendants' motion to strike these allegations in their entirety. We agree with the plaintiffs that the trial court improperly concluded that they lack standing to pursue any of their CUTPA claims against the defendants'. With respect to the plaintiffs' first theory of CUTPA liability—that the sale of AR-15s to the civilian population is ipso facto unfair—we agree with the defendants' that the trial court's judgment can be affirmed on the alternative ground that the plaintiffs' claim is time barred under the CUTPA statute of limitations. Cf. footnote 14 of this opinion. However, with respect to the plaintiffs' second theory of liability—that the defendants' wrongful marketing of the XM15-E2S for illegal, offensive purposes was a causal factor in increasing the casualties of the Sandy Hook massacre—we find the defendants' various alternative bases for affirmance unpersuasive.

A

CUTPA Standing

Although the plaintiffs brought their claims pursuant to the wrongful death statute; General Statutes § 52-555; a wrongful death action will lie only when the deceased person could have brought a valid claim for the injuries that resulted in death if he or she had survived. See part IV B of this opinion. Accordingly, to survive a motion to strike, the plaintiffs must be able to establish that they have standing to pursue a CUTPA claim for their injuries. We first consider whether the trial court properly concluded that the plaintiffs lacked standing to bring the present action under CUTPA because they were third-party victims who did not have a direct consumer, commercial, or competitor relationship (business relationship or privity requirement) with the

defendants'. Because the principal evils associated with unscrupulous and illegal advertising are not ones that necessarily arise from or infect the relationship between an advertiser and its customers, competitors, or business associates, we hold that a party directly injured by conduct resulting from such advertising can bring an action pursuant to CUTPA even in the absence of a business relationship with the defendant. Accordingly, we agree with the plaintiffs that the trial court improperly struck their CUTPA based wrongful death claims.

Whether one must have entered into a consumer or commercial relationship with an alleged wrongdoer in order to have standing to bring a CUTPA action presents a question of statutory interpretation. The plain meaning of the statutory text must be our lodestar. See General Statutes § 1-2z.

General Statutes § 42-110g (a) creates a private right of action for persons injured by unfair trade practices and provides in relevant part: "*Any person* who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages. . . ." (Emphasis added.) On its face, the statute plainly and unambiguously authorizes *anyone* who has suffered an ascertainable financial loss as a result of an unfair trade practice to bring a CUTPA action. Nothing in the text of the statute indicates that the right afforded by § 42-110g (a) is enjoyed only by persons who have done business of some sort with a defendant.

Even if we were to conclude that the statute is ambiguous in this regard, we perceive nothing in the legislative history or purpose of the statute that would

support the defendants' theory that something more than an ascertainable financial loss caused by a prohibited act is necessary to confer standing under CUTPA. When CUTPA originally was enacted in 1973, the statute authorized private actions for "[a]ny person who *purchases or leases goods or services from a seller or lessor primarily for personal, family or household purposes and thereby* suffers any ascertainable loss of money or property, real or personal, as a result . . . ." (Emphasis added.) Public Acts 1973, No. 73-615 No. 73-615, § 7 (P.A. 73-615), codified as amended at General Statutes (Rev. to 1975) § 42-110g(a). It is clear, then, that a direct consumer relationship initially was required in order to bring a CUTPA action.

Over the following decade, however, a series of amendments eliminated that privity requirement. Of particular note are the 1975 and 1979 amendments. In 1975, the legislature amended the statute to confer standing on two distinct classes of plaintiffs. See Public Acts 1975, No. 75-618 No. 75-618, § 5 (P.A. 75-618). As amended, the statute provided that CUTPA actions can be brought either by "any person who purchases or leases goods or services from a seller or lessor primarily for personal, family or household purposes and thereby suffers any ascertainable loss . . . as a result" or by "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result [of a prohibited practice] . . . ."

P.A. 75-618, § 5, codified as amended at General Statutes (Rev. to 1977) § 42-110g (a). In other words, the legislature conferred standing on an additional category of plaintiffs, namely, those whose injuries were not the result of a direct consumer purchase or lease of goods or services. Presumably recognizing that the original

category of CUTPA plaintiffs (consumer direct purchasers and lessors) had become redundant insofar as it was merely a subset of the new, broader category that had been added in the 1975 amendments—i.e., any person who suffers an injury as a result of a prohibited practice—the legislature amended the statute again in 1979 to eliminate the reference to direct purchasers. See Public Acts 1979, No. 79-210 No. 79-210, § 1, codified at General Statutes (Rev. to 1981) § 42-110g (a). As we previously have explained; see *Vacco* v. *Microsoft Corp.*, 260 Conn. 59, 86–87 and n.30, 793 A.2d 1048 (2002); it is clear from this history that, although a business relationship initially was required to bring a CUTPA action, the legislature chose to eliminate that privity requirement and instead conferred standing on any person who could establish an ascertainable loss as a result of an unfair trade practice.

This conclusion finds additional support in the legislative proceedings pertaining to the various 1970s amendments. From the start, CUTPA prohibited unfair trade practices associated not only with the actual sale and distribution of products and services, but also with the advertising and offering of those products and services for sale.[26] However, when the House of Representatives debated Substitute House Bill No. 5613, the bill that ultimately became No. 78346. However, when the House of Representatives debated Substitute House Bill No. 5613, the bill that ultimately became No.

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[26] General Statutes (Rev. to 1975) § 42-110b (a) provided in relevant part: "No person shall engage in unfair methods of competition . . . in the conduct of any trade or commerce. . . ." General Statutes (Rev. to 1975) § 42-110a (4) defined "trade and commerce" as "the advertising, offering for sale, sale, or distribution of any services and any property. . . ."

78346 of the 1978 Public Acts, several representatives expressed concerns that the original file copy of that bill might be understood to mean that unfair advertising would no longer constitute a prohibited trade practice. In explaining the need to amend the bill, Representative Raymond C. Ferrari cautioned that CUTPA should not be watered down so as to "require the actual sale of an item as opposed to simply allow[ing] the enforcement under an advertisement . . . ." 21 H.R. Proc., Pt. 10, 1978 Sess., p. 3987. Representative Robert F. Frankel expressed similar sentiments. See 21 H.R. Proc., Pt. 11, 1978 Sess., p. 4319 ("we would actually be rolling back some of the coverage of [CUTPA] wherein we would be requiring a sale of advertised products before the Commissioner [of Consumer Protection] could become involved"). The fact that the legislature sought to ensure that advertising alone—even advertising that never results in a sale—could constitute a prohibited practice suggests that an actual business relationship was not deemed to be a precondition for a CUTPA action following the 1975 amendments.

It is true that the primary concern of those representatives during the 1978 hearings was to prevent the Department of Consumer Protection (department) from being stripped of its authority to aggressively enforce CUTPA violations relating to false or misleading advertising. It is, of course, possible that the legislature wanted the department to be able to curtail wrongful advertising campaigns at their inception, without having to wait until consumers were harmed before taking legal action, but intended that private individuals not have standing to sue unless and until they had purchased goods or services in reliance on such advertisements. It bears emphasis, however, that the legislative history of CUTPA is replete not only with references to the broad

scope and remedial nature of the act[27] but also with statements specifically indicating a legislative awareness that the department and the Office of the Attorney General were not equipped to prosecute every unfair trade practice and a concomitant belief that it was important to incentivize broad enforcement action by private litigants.[28] See, e.g., *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 615 and nn. 4–5, 618, 440 A.2d 810 (1981).

More directly on point is the testimony of Assistant Attorney General Arnold Feigen, which was offered on behalf of Attorney General Carl Ajello and Commissioner of Consumer Protection Mary Heslin, before the General Law Committee. See Conn. Joint Standing Committee Hearings, General Law, Pt. 4, 1979 Sess., p. 1159. Testifying in favor of the 1979 amendment that eliminated the direct purchaser requirement language, Feigen explained that "[n]umerous arguments have been raised in both state and federal courts that [a] plaintiff, in order to sue, must be a purchaser or a lessee of a seller . . . ." *Id.* "The amendment," he opined, "will now allow a suit by any person who suffers any ascertainable loss of money or property." *Id.* Those statements, although not dispositive of the question before us, provide support for the plaintiffs' theory that the legislature intended to eliminate the business relationship requirement when it amended CUTPA. See *Vacco* v. *Microsoft Corp.*, supra, 260 Conn. at 86–87 and n.30, 793 A.2d 1048.

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[27] See, e.g., 19 H.R. Proc., Pt. 6, 1976 Sess., pp. 2186–87, remarks of Representative Ferrari.

[28] See, e.g., 22 S. Proc., Pt. 8, 1979 Sess., p. 2575, remarks of Senator Steven C. Casey; 19 S. Proc., Pt. 6, 1976 Sess., pp. 2276–78, remarks of Senator Louis Ciccarello.

The defendants', while implicitly acknowledging that the plain language of § 42-110g (a) no longer imposes a business relationship requirement, offer two arguments as to why we should continue to read such a requirement into the statute. First, they contend that the trial court properly concluded that our prior cases and those of the Appellate Court have recognized a business relationship requirement and that principles of stare decisis and legislative acquiescence counsel against departing from those decisions. Second, the defendants' contend that prudential concerns support limiting CUTPA standing to persons who have a direct business relationship with the alleged wrongdoer. We consider each argument in turn.

In support of its conclusion that our cases impose a business relationship requirement, the trial court relied on this court's decisions in *Vacco* v. *Microsoft Corp.*, supra, 260 Conn. at 59, 793 A.2d 1048, and *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S.Ct. 1913, 164 L.Ed.2d 664 (2006). Neither decision compels such a result.

In *Vacco*, we recognized that the legislature, by "'deleting all references to "purchasers, sellers, lessors, or lessees"'" in § 42-110g (a) in 1979, had eliminated CUTPA's privity requirement. *Vacco* v. *Microsoft Corp.*, supra, 260 Conn. at 88, 793 A.2d 1048. We proceeded to clarify, however, that the elimination of the privity requirement did not mean that *anyone* could bring a CUTPA action, no matter how attenuated the connection between his or her injuries and a defendant's allegedly unfair trade practices. "Notwithstanding the elimination of the privity requirement," we explained, "it strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable

harm, caused by any person in the conduct of any trade or commerce." (Internal quotation marks omitted.) *Id.* We further observed, however, that CUTPA liability could reasonably be cabined in the same manner as with common-law tort actions: "[N]otwithstanding the broad language and remedial purpose of CUTPA, we have applied traditional common-law principles of remoteness and proximate causation to determine whether a party has standing to bring an action under CUTPA." (Footnote omitted.) *Id.* Notably, we cited *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001), as an example of a case in which the alleged harms suffered by the plaintiffs—the city of Bridgeport and its mayor—as a result of gun violence were "too remote and derivative" with respect to the challenged conduct for the plaintiffs to have standing to bring a CUTPA claim. *Vacco* v. *Microsoft Corp.*, supra, at 88–89, 793 A.2d 1048, citing *Ganim* v. *Smith & Wesson Corp.*, supra, at 344, 365, 780 A.2d 98. We proceeded in *Vacco* to apply the same three part remoteness analysis that we had applied in *Ganim*, ultimately concluding that the plaintiff lacked standing because his injuries were too remote in relation to the defendant's allegedly anticompetitive conduct. *Vacco* v. *Microsoft Corp.*, supra, at 90–92, 793 A.2d 1048; see *Ganim* v. *Smith & Wesson Corp.*, supra, at 353, 780 A.2d 98. Accordingly, *Vacco* stands for the proposition that standing to bring a CUTPA claim will lie only when the purportedly unfair trade practice is alleged to have directly and proximately caused the plaintiff's injuries. This remoteness requirement serves the same function as a privity requirement, as it mitigates any concerns associated with imposing limitless liability on CUTPA defendants'.

Although our decision in *Ventres* could be read to suggest that the plaintiff must have a business

relationship with the defendant, a closer review indicates that it does not stand for this sweeping proposition. In that case, a land trust and a conservancy (property owners) alleged that the named defendant, Goodspeed Airport, LLC, among other defendants', had violated CUTPA by trespassing on the property owners' land. See *Ventres* v. *Goodspeed Airport, LLC*, supra, 275 Conn. at 109, 112, 881 A.2d 937. We concluded, as a matter of law, that, even if the property owners had been able to prove their allegations, none of the alleged conduct would have risen to the level of a CUTPA violation. See *id.*, at 156–58, 881 A.2d 937.

As an alternative, independent basis for upholding the trial court's decision to strike the property owners' CUTPA claims, we briefly considered the property owners' contention that a CUTPA plaintiff is not required to allege any business relationship with a defendant, summarily rejecting that claim on the ground that the property owners had provided no authority for the proposition. *Id.*, at 157–58, 881 A.2d 937. Significantly, in contrast to the present case, *Ventres* did not involve allegations that a business relationship between the defendants' and a third party had resulted in the harm alleged. Therefore, we had no occasion to discuss or apply the proximate cause analysis set forth in *Vacco*. See *Vacco* v. *Microsoft Corp.*, supra, 260 Conn. at 90–92, 793 A.2d 1048. In other words, there was no business relationship that could result in any causal connection to the injury alleged.

Accordingly, the court in *Ventres* did not hold that every CUTPA claim requires a business relationship between a plaintiff and a defendant. Indeed, we did not analyze that issue, and at no point did we examine either the text or the legislative history of the statute, both of

which, as we previously explained, strongly suggest that the legislature did not intend to impose a privity requirement. We thus conclude that the principles of stare decisis and legislative acquiescence do not preclude us from construing § 42-110g (a) de novo in the present case to address this question. See *Igartua* v. *Obama*, 842 F.3d 149, 160 (1st Cir. 2016) (Torruella, J., concurring in part and dissenting in part) ("[c]onsidering the cursory treatment given to this issue by the . . . panel [in the prior decision], our hands are not tied by stare decisis"), cert. denied sub nom. *Igartua* v. *Trump*, --- U.S. ---, 138 S.Ct. 2649, 201 L.Ed.2d 1050 (2018).

Next, we consider the defendants' argument that this court has, for prudential reasons, set various limitations on the types of parties that may bring CUTPA claims. The defendants' contend that similar policy rationales counsel in favor of imposing a business relationship requirement. In two of the cases that the defendants' cite in support of this proposition, however, this court concluded that CUTPA simply did not govern the conduct at issue, and, therefore, we did not consider the question of standing. See *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 34, 699 A.2d 964 (1997) (medical malpractice claims are not subject to CUTPA); *Russell* v. *Dean Witter Reynolds, Inc.*, 200 Conn. 172, 180, 510 A.2d 972 (1986) (CUTPA does not apply to deceptive practices in purchase and sale of securities). In the third case on which the defendants' rely, namely, *Jackson* v. *R. G. Whipple, Inc.*, 225 Conn. 705, 627 A.2d 374 (1993), this court concluded that third parties lacked CUTPA standing only in the context of the unique professional relationship between attorneys and their clients. See *id.*, at 729, 627 A.2d 374. Accordingly, the cases that the defendants' cite, which address unique professional service contexts and relationships, provide little support

for the general proposition that CUTPA does not confer standing outside the limited confines of a business relationship between the CUTPA plaintiff and defendant.

We need not decide today whether there are other contexts or situations in which parties who do not share a consumer, commercial, or competitor relationship with an alleged wrongdoer may be barred, for prudential or policy reasons, from bringing a CUTPA action. What is clear is that none of the rationales that underlie the standing doctrine, either generally or in the specific context of unfair trade practice litigation, supports the denial of standing to the plaintiffs in this case. "Standing . . . is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticable interests and that judicial decisions [that] may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *Slimp* v. *Dept. of Liquor Control*, 239 Conn. 599, 609, 687 A.2d 123 (1996). As we explained in *Ganim* v. *Smith & Wesson Corp.*, supra, 258 Conn. at 313, 780 A.2d 98, there are several reasons why standing traditionally has been restricted to those parties directly injured by a defendant's conduct: "First, the more indirect an injury is, the more difficult it becomes to determine the amount of [the] plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary [when] there are directly injured parties who can remedy the harm

without these attendant problems." (Internal quotation marks omitted.) *Id.*, at 353, 780 A.2d 98.

*Ganim*, in fact, provides an instructive contrast to the present case. In *Ganim*, the mayor and the city of Bridgeport brought an action against handgun manufacturers, trade associations, and retail gun sellers to recoup various municipal costs associated with gun violence, including increased police and emergency services, loss of investment, and victimization of Bridgeport's citizens. *Id.*, at 315–16, 326–27, 780 A.2d 98. We concluded that the municipal plaintiffs lacked standing under CUTPA because the "harms claimed . . . [were too] indirect, remote and derivative with respect to the defendants' conduct . . . ." *Id.*, at 353, 780 A.2d 98. Moreover, we observed that one easily could identify several sets of potential plaintiffs who were more directly harmed by the defendants' alleged misconduct than was the city: "[A]ll [of] the homeowners in Bridgeport who have been deceived by the defendants' misleading advertising, all of the persons who have been assaulted or killed by the misuse of the handguns, and all of the families of the persons who committed suicide using those handguns." *Id.*, at 359, 780 A.2d 98.

In the present case, by contrast, the plaintiffs allege that the defendants' wrongful advertising magnified the lethality of the Sandy Hook massacre by inspiring Lanza or causing him to select a more efficiently deadly weapon for his attack. Proving such a causal link at trial may prove to be a Herculean task.[29] But if it can be proven—

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[29] See, e.g., *Bubalo* v. *Navegar, Inc.*, Docket No. 96 C 3664, 1997 WL 337218, *9 (N.D. Ill. June 13, 1997), modified on other grounds, 1998 WL 142359 (N.D. Ill. March 20, 1998); S. Calkins, "FTC Unfairness: An Essay," 46 Wayne L. Rev. 1935, 1975–76 n.182 (2000); T. Lytton, "*Halberstam* v. *Daniel* and the Uncertain Future of Negligent

and the posture in which this case reaches us requires that we assume it can[30]—the link between the allegedly wrongful conduct and the plaintiffs' injuries would be far more direct and less attenuated than in *Ganim*.

More fundamentally, in this case, unlike in *Ganim*, it is the direct victims of gun violence who are challenging the defendants' conduct; no private party is better situated than the plaintiffs to bring the action. A claim that a defendant's advertisements unethically promote illegal conduct is fundamentally different from one alleging false or misleading advertising. The primary harm associated with the latter is that a consumer will rely to his or her detriment on the advertiser's representations; it is in the misinformed purchase of the product or service that the wrong becomes fully manifest. Actual customers, then, typically will be the parties most directly and adversely impacted by the alleged wrong.

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Marketing Claims Against Firearms Manufacturers," 64 Brook. L. Rev. 681, 704–705 (1998).

[30] We note that other courts and commentators have deemed this to be a plausible theory of causation. See *Friedman* v. *Highland Park*, 784 F.3d 406, 411 (7th Cir.) (ban on assault weapons and large capacity magazines may reduce carnage if mass shooting occurs), cert. denied, --- U.S. ---, 136 S.Ct. 447, 193 L.Ed.2d 483 (2015); *Merrill* v. *Navegar, Inc.*, supra, 26 Cal. 4th at 517, 110 Cal. Rptr.2d 370, 28 P.3d 116 (Werdegar, J., dissenting) (reasonable juror could find that features of assault pistol allowed shooter to kill and injure more victims than would have been possible with conventional weapons); T. Lytton, "*Halberstam* v. *Daniel* and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers," 64 Brook. L. Rev. 681, 706 (1998) ("[i]f plaintiffs can somehow prove that a defendant's marketing efforts create a new market among individuals known to be likely to engage in criminal activity who, but for the defendant's efforts, would be less likely to purchase a weapon . . . with the firepower of the defendant's, then [those] plaintiffs may be able to convince a jury on the issues of breach and causation").

The gravamen of a wrongful advertising claim, by contrast, is that an advertisement models or encourages illegal or unsafe behavior. In such instances, the immediate victims are just as likely to be third parties who are not customers, whether it be individuals who engage in inappropriate conduct inspired by the advertisements or the direct victims of that conduct. For example, when an especially racy sports car commercial disclaims, "professional driver, closed course, do not attempt this at home," the perceived risk is not merely—or even primarily—that viewers will purchase that particular vehicle and drive it unsafely as a result of the commercial. Of at least equal concern is the possibility that noncustomer viewers will emulate the commercial when driving their own vehicles, violating motor vehicle laws, and possibly causing injury to themselves or others, including passengers or pedestrians.

In the present case, the wrong charged is that the defendants' promoted the use of their civilian assault rifles for offensive, military style attack missions. The most directly foreseeable harm associated with such advertising is that innocent third parties could be shot as a result. The decedents are the ones who got shot.

If the defendants' marketing materials did in fact inspire or intensify the massacre, then there are no more direct victims than these plaintiffs; nor is there any customer of the defendants' with a better claim to standing. That is to say, if these plaintiffs cannot test the legality of the defendants' advertisements pursuant to § 42-110g, then no one can. For these reasons, we conclude that the trial court improperly determined that the plaintiffs lack standing to assert wrongful death claims predicated on the defendants' alleged CUTPA violations.

## B
## Statute of Limitations

Having concluded that the plaintiffs have standing to bring the present action, we must turn our attention to whether the judgment of the trial court dismissing the plaintiffs' action may be affirmed on an alternative ground. Although its determination that the plaintiffs lacked standing to bring wrongful death claims predicated on alleged CUTPA violations disposed of the case before it, the trial court considered, in the interest of completeness, the defendants' arguments regarding the legal sufficiency of the plaintiffs' CUTPA claims. We first consider the defendants' argument that the plaintiffs' claims are time barred because they did not comply with CUTPA's three year statute of limitations.

### 1
### Procedural History

The following additional procedural history is relevant to this claim. The complaint alleges that Lanza's mother purchased the rifle in question in March, 2010, and that it was manufactured and distributed sometime prior to that date. Lanza carried out the Sandy Hook massacre on December 14, 2012, on which date all of the decedents died. The plaintiffs delivered their summons and complaint to a state marshal on December 13, 2014.

The defendants' moved to strike the plaintiffs' wrongful death claims on the theory that those claims are predicated on underlying CUTPA violations and that private actions brought pursuant to CUTPA are subject to a three year statute of limitations. See

Statutes § 42-110g (f).[31] They argued that, because all of the relevant transfers of the rifle occurred no later than March, 2010, and because the present action was not initiated until more than four years later, in December, 2014, the plaintiffs' CUTPA claims are time barred.

The trial court, like the defendants', proceeded on the theory that the date of the alleged CUTPA violations was, at the very latest, March, 2010, when the Riverview defendants' sold the rifle to Lanza's mother. The court was not persuaded, however, that CUTPA is the controlling statute of limitations for purposes of the present action. Rather, the court emphasized that, although the plaintiffs' claims were predicated on a theory of liability sounding in unfair trade practices, those claims were *brought* pursuant to § 52-555, the wrongful death statute. That statute has its own statute of limitations, which requires that a wrongful death action "be brought . . . within two years from the date of death," and its own statute of repose, which requires that a wrongful death action "be brought [no] more than five years from the date of the act or omission complained of." General Statutes § 52-555 (a). Because process was served within two years of the date of the decedents' deaths and within five years of the date on which the rifle was sold, the court concluded that the action would not be time barred if the statute of limitations contained in § 52-555 (a) controls.

The trial court therefore sought to resolve the apparent conflict between the statutes of limitations contained in §§ 42-110g (f) and 52-555 (a). Relying on the decision of the Appellate Court in *Pellecchia* v.

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[31] General Statutes § 42-110g (f) provides: "An action under this section may not be brought more than three years after the occurrence of a violation of this chapter."

*Connecticut Light & Power Co.*, 139 Conn. App. 88, 90, 54 A.3d 658 (2012) (adopting trial court's memorandum of decision in *Pellecchia* v. *Connecticut Light & Power Co.*, 52 Conn. Supp. 435, 54 A.3d 1080 [2011]), cert. denied, 307 Conn. 950, 60 A.3d 740 (2013), the trial court concluded that, when a wrongful death claim is predicated on an underlying theory of liability that is subject to its own statute of limitations, it is the wrongful death statute of limitations that controls. Because the court concluded that the CUTPA statute of limitations did not apply, and because the action was brought within two years of the decedents' deaths and within five years of the initial sale of the rifle, the court also concluded that the plaintiffs' wrongful death claims were timely. Accordingly, the court did not have reason to consider whether the plaintiffs' claims predicated on a wrongful advertising theory of liability, which could be premised on conduct postdating the sale of the rifle, were timely.

2

Legal Principles

Turning to the governing legal principles, we first consider whether the trial court correctly determined that, when a wrongful death claim is predicated on an underlying theory of liability that is subject to its own statute of limitations, the plaintiffs need only satisfy the statute of limitations contained in § 52-555 (a). The trial court was correct that, in the ordinary case, § 52-555 (a) supplies the controlling statute of limitations regardless of the underlying theory of liability.

This court applied that rule in *Giambozi* v. *Peters*, 127 Conn. 380, 16 A.2d 833 (1940), overruled in part on other grounds by *Foran* v. *Carangelo*, 153 Conn. 356, 216 A.2d 638 (1966), in which the court held that the statute of limitations of the predecessor wrongful death statute,

rather than the limitations provision applicable to medical malpractice claims, governed in a wrongful death action based on malpractice. *Id.*, at 385, 16 A.2d 833; see also *Ecker* v. *West Hartford*, 205 Conn. 219, 245, 530 A.2d 1056 (1987) (suggesting that statute of limitations contained in § 52-555 may control in wrongful death actions predicated on contract and warranty theories of liability). The legislative history of the 1991 amendments to the wrongful death statute reflecting the current statutory language; Public Acts 1991, No. 91-238 No. 91-238, § 1; makes clear that *Giambozi* continues to accurately reflect the intent of the legislature in this respect. See 34 H.R. Proc., Pt. 14, 1991 Sess., pp. 5170–72, remarks of Representative Michael P. Lawlor (expressing view that there would be cases in which plaintiffs would be able to maintain wrongful death action under 1991 amendment to § 52-555 even though statute of limitations applicable to underlying medical malpractice would have run).

As the defendants' emphasize, however, it is well established that different rules apply to statutes, such as CUTPA, that create a right of action that did not exist at common law. See *Greco* v. *United Technologies Corp.*, 277 Conn. 337, 345 n.12, 890 A.2d 1269 (2006). For such statutes, we have said that the limitations provision "embodies an essential element of the cause of action created—a condition attached to the right to sue at all. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right . . . . It follows that the statutory provision or provisions prescribing the limitation must be strictly observed if liability is to attach to the claimed offender. Failure to show such observance results in a failure to show the existence of a good cause of action." (Internal quotation marks omitted.) *Blakely* v.

*Danbury Hospital*, 323 Conn. 741, 748–49, 150 A.3d 1109 (2016); see also *id.*, at 749, 150 A.3d 1109 (time limitation is "essential and integral" to existence of cause of action); *Avon Meadow Condominium Assn., Inc.* v. *Bank of Boston Connecticut*, 50 Conn. App. 688, 699–700, 719 A.2d 66 (time limitation that is contained within statute that creates right of action that did not exist at common law is limitation of liability itself, and, accordingly, CUTPA statute of limitations is jurisdictional), cert. denied, 247 Conn. 946, 723 A.2d 320 (1998), and cert. denied, 247 Conn. 946, 723 A.2d 320 (1998).

The plaintiffs respond that, regardless of whether the statute of limitations contained in § 42-110g (f) amounts to an essential element of a CUTPA cause of action, it need not be satisfied in the present case because this is not a CUTPA action. Rather, their claims are wrongful death claims, for which CUTPA merely provides the underlying theory of wrongfulness.

That argument, although perhaps facially attractive, is precluded by a long line of cases holding that Connecticut's wrongful death statute does not create a new cause of action, independent of any claims that the decedent might have had during his or her life. Rather, the wrongful death statute merely allows the administrator of an estate to append to an already valid claim an additional element of damages consisting of costs associated with the decedent's death. See, e.g., *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 149, 491 A.2d 389 (1985); *Foran* v. *Carangelo*, supra, 153 Conn. at 360, 216 A.2d 638; *Shaker* v. *Shaker*, 129 Conn. 518, 520–21, 29 A.2d 765 (1942); see also *Kling* v. *Torello*, 87 Conn. 301, 305–306, 87 A. 987 (1913). A necessary consequence of this principle is that a cause of action for wrongful death predicated on a CUTPA

violation will lie only insofar as the decedent, had he or she survived, could have satisfied all of the essential elements of the CUTPA claim. See, e.g., *Roque* v. *United States*, 676 F. Supp.2d 36, 42 (D. Conn. 2009) (plaintiff must prove elements of negligence claim in wrongful death action predicated on negligence); *Nolan* v. *Morelli*, 154 Conn. 432, 435, 226 A.2d 383 (1967) (plaintiff must establish that decedent could recover damages under Dram Shop Act in wrongful death action predicated on that statute); see also *Schwarder* v. *United States*, 974 F.2d 1118, 1129 (9th Cir. 1992) (Alarcon, J., concurring in part and dissenting in part) ("[a] majority of the state courts that have considered the question have held that a survivor cannot bring a wrongful death action if the decedent was barred from [bringing a claim for his injuries] in his lifetime, because the wrongful death claim is essentially derivative of the injury to the decedent"); W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 127, p. 955 ("[t]he wrongful death action for the benefit of survivors is, like other actions based on injuries to others, derivative in nature, arising out of and dependent [on] the wrong done to the injured person and thus barred when his claim would be barred" [footnote omitted]). It is clear, then, that the plaintiffs' wrongful death claims must comply not only with the statute of limitations that governs wrongful death actions but also with CUTPA's statute of limitations. Accordingly, because it is undisputed that the manufacture, distribution, and final sale of the rifle to Lanza's mother all occurred at least three years prior to the commencement of the present action, we conclude that the trial court should have struck as time barred the plaintiffs' wrongful death claims predicated on a theory that any sale to the civilian market of military style

assault weapons such as the AR-15 represents an unfair trade practice. Cf. footnote 14 of this opinion.

That determination, however, is not fatal to all of the plaintiffs' claims. As we discussed, the plaintiffs also pleaded, in the alternative, that the defendants' violated CUTPA by advertising and marketing the XM15-E2S in an unethical, oppressive, immoral, and unscrupulous manner. Although the complaint does not specifically allege on what dates or over what period of time such marketing activities occurred, most of the plaintiffs' wrongful marketing claims are phrased in the present tense and, therefore, may be understood to allege that those activities continued through the time the complaint was filed. In addition, the plaintiffs' allegation that Lanza selected the XM15-E2S on the morning of the assault "because of its marketed association with the military" reasonably could be interpreted to mean that such marketing schemes remained in place at the time of the massacre, during the limitation period. Accordingly, because we are compelled to construe the complaint liberally, in the manner most favorable to sustaining its legal sufficiency, we conclude that, for present purposes, the plaintiffs' wrongful advertising theory is not barred by CUTPA's statute of limitations.[32]

C

Connecticut Product Liability Act Preemption

We next consider whether the trial court correctly determined that § 52-572n (a), the exclusivity provision of the Product Liability Act, does not bar the plaintiffs'

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[32] Of course, on remand the defendants' are not foreclosed from attempting to demonstrate, in the context of a motion for summary judgment, that they did not engage in any of the allegedly wrongful marketing activities within three years prior to the date of the massacre.

CUTPA claims. Section 52-572n (a) provides that "[a] product liability claim as provided in [the Product Liability Act] may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product." The defendants' contend that all of the plaintiffs' CUTPA claims ultimately boil down to the argument that the XM15-E2S is unreasonably dangerous for sale to the civilian market and, therefore, that manufacturers and distributors of that weapon should be held strictly liable for any injuries resulting from its misuse. They contend that this is "nothing more than a [P]roduct [L]iability [A]ct claim dressed in the robes of CUTPA"; *Gerrity* v. *R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 129, 818 A.2d 769 (2003); and that, pursuant to § 52-572n(a), the Product Liability Act provides the exclusive remedy. We are not persuaded.

As we have explained, the plaintiffs' wrongful death claims are predicated on two distinct theories of unfair trade practice: (1) the sale of assault rifles such as the XM15-E2S to the civilian market is inherently unreasonable and dangerous; and (2) the defendants' marketed and promoted the XM15-E2S in an unethical, oppressive, immoral, and unscrupulous manner. The defendants' primary argument with respect to the Product Liability Act relates to the plaintiffs' first theory of liability. Because we have concluded that claims predicated on the plaintiffs' first CUTPA based theory of liability are time barred, however, we need not determine whether those claims also are precluded by § 52-572n (a). Cf. footnote 14 of this opinion.

With respect to the plaintiffs' second theory of liability, the defendants' fail to offer any explanation as to why the allegation that they wrongfully marketed the

XM15-E2S by promoting the gun's use for illegal purposes—offensive, military style assault missions—amounts to a product defect claim.[33] There is no allegation in the present case, for example, that the marketing for the XM15-E2S contained inadequate warnings that made the weapon unreasonably dangerous.

The defendants' sole argument in this regard is their contention that, in *Merrill* v. *Navegar, Inc.*, supra, 26 Cal. 4th at 465, 110 Cal. Rptr.2d 370, 28 P.3d 116, the California Supreme Court rejected allegations of wrongful firearms marketing as disguised product liability claims. We read *Merrill* differently. It is true that the California Supreme Court concluded that many of the negligent marketing and distribution claims at issue in that case were barred by a California statute that provided that a gun manufacturer may not be held liable in a product liability action on the basis that the benefits of its product fail to outweigh the product's risk of injury when discharged. *Id.*, at 470, 110 Cal. Rptr.2d 370, 28 P.3d 116; see Cal. Civ. Code § 1714.4 (a) (Deering 1994) (repealed in 2002). But the claims in *Merrill*, while dressed in terms of negligent marketing and distribution, were substantially similar to the claims of the plaintiffs in the present case, namely, that the sale of assault weapons to the civilian market is inherently unreasonable because those weapons have no legitimate civilian purpose. See

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[33] We note that, although a "'[p]roduct liability claim' includes all claims or actions brought for personal injury, death or property damage caused by [among other things] the . . . marketing . . . of any product"; General Statutes § 52-572m (b); it is well established that the exclusivity provision of the Product Liability Act applies only to those claims seeking to recover damages caused by a *defective* product. *Gerrity* v. *R.J. Reynolds Tobacco Co.*, supra, 263 Conn. at 128, 818 A.2d 769.

*Merrill* v. *Navegar, Inc.*, supra, at 470, 480–81, 110 Cal. Rptr.2d 370, 28 P.3d 116.

The only claims at issue in *Merrill* that were akin to the plaintiffs' immoral advertising claims were their allegations that Navegar, Inc. (Navegar), a gun manufacturer, advertised its semiautomatic assault pistols "as tough as your toughest customer" and as featuring "excellent resistance to finger prints," which might have suggested that the weapons were especially well suited for criminal use. (Internal quotation marks omitted.) *Id.*, at 471, 110 Cal. Rptr.2d 370, 28 P.3d 116. In holding that the trial court had properly granted Navegar's motion for summary judgment with respect to those "more inflammatory aspects of Navegar's advertising"; *id.*, at 489, 110 Cal. Rptr.2d 370, 28 P.3d 116; however, the California Supreme Court relied not on the immunity provision in California's product liability statute but, rather, on the facts that (1) the plaintiffs in *Merrill* expressly disavowed any claims based on the specific content of Navegar's advertising; *id.*, at 474, 487–88, 110 Cal. Rptr.2d 370, 28 P.3d 116; and (2) there was no evidence that the shooter in that case ever had seen, let alone had been inspired by, any of Navegar's allegedly inappropriate promotional materials. *Id.*, at 471, 473, 488–91, 110 Cal. Rptr.2d 370, 28 P.3d 116. Accordingly, we do not read *Merrill* as supporting the defendants' contention that the wrongful advertising claims in the present case are merely masked product defect claims.

The defendants' have offered no other arguments as to why the plaintiffs' wrongful advertising claims represent veiled product liability claims. Accordingly, we conclude that those claims are not precluded by § 52-572n(a). See *Gerrity* v. *R.J. Reynolds Tobacco Co.*, supra, 263 Conn. at 124, 128, 818 A.2d 769 (analyzing

language of exclusivity provision and concluding that claim that tobacco companies violated CUTPA by targeting minors with their cigarette advertising did not allege product defect and, therefore, was not precluded by Product Liability Act).

D

CUTPA Personal Injury Damages

We next consider the defendants' argument that personal injuries resulting in death do not give rise to cognizable damages for purposes of CUTPA.[34] As we explained, an action for wrongful death will lie only if the deceased, had he or she survived, would have had a valid claim for the injuries that resulted in death. See part IV B of this opinion. For that reason, the plaintiffs can prevail on their CUTPA based wrongful death claims only if CUTPA permits the recovery of damages for the decedents' injuries. As a matter of first impression, we hold that CUTPA permits recovery for personal injuries that result directly from wrongful advertising practices.[35]

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[34] Although the defendants' frame the issue as whether damages for wrongful death are recoverable under CUTPA, the issue is more accurately characterized as whether CUTPA permits recovery for personal injuries, fatal or otherwise. Because death itself was not a recognized type of damage at common law, "[d]eath and its direct consequences can constitute recoverable elements of damages only if, and to the extent that, they are made so by statute." *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 295, 627 A.2d 1288 (1993). In fact, "[t]he wrongful death statute . . . is the sole basis [on] which an action that includes as an element of damages a person's death or its consequences can be brought." (Citation omitted.) *Id.* There is no question, then, that CUTPA itself does not authorize the recovery of damages for wrongful death.

[35] We express no opinion as to under what other circumstances CUTPA may allow recovery for personal injuries.

Whether personal injuries give rise to cognizable CUTPA damages presents a question of statutory interpretation. We begin by setting forth the relevant statutory language. Subsection (a) of § 42-110g contains two clauses potentially relevant to the issue before us. First, subsection (a) creates a private right of action for "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b . . . ." This provision is known as the ascertainable loss clause. Second, subsection (a) provides that any person so injured "may bring an action . . . to recover actual damages." This provision of subsection (a) is known as the actual damages clause.

The view of the plaintiffs is that these two clauses serve distinct, independent functions within the statute and that only the actual damages clause restricts the types of damages that are available. Specifically, they contend that, although one must suffer some ascertainable loss of money or property in order to have *standing* to bring a CUTPA action, once the standing requirements set by the ascertainable loss clause have been satisfied, a successful plaintiff may *recover* not only for those financial losses but for any and all actual damages. Relying on *DiNapoli* v. *Cooke*, 43 Conn. App. 419, 427, 682 A.2d 603, cert. denied, 239 Conn. 951, 686 A.2d 124 (1996), cert. denied, 520 U.S. 1213, 117 S.Ct. 1699, 137 L.Ed.2d 825 (1997), the plaintiffs further contend that the term "actual damages" is synonymous with compensatory or general damages and excludes only special damages such as nominal and punitive damages. Certainly, they contend, that term is sufficiently expansive to encompass personal injuries.

The defendants', by contrast, argue that the ascertainable loss clause modifies and cabins the meaning of the actual damages clause. In their view, the fact that a plaintiff must have suffered some manner of financial loss to bring a CUTPA action implies that the legislature intended to limit recovery to damages of that sort. Insofar as both of these interpretations of the statutory language are facially plausible,[36] we conclude that the statute is ambiguous and that we may properly look to extratextual sources to ascertain the intent of the legislature. See General Statutes § 1-2z.

The legislative histories of CUTPA and of the model legislation on which CUTPA is based are largely silent with respect to the question of personal injury damages. R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2018–19 Ed.) § 6.7, pp. 849, 851. Nevertheless, four considerations persuade us that the legislature did not intend to bar plaintiffs from recovering for personal injuries resulting from unfair trade practices, at least under circumstances such as those presented here.

First, although both the plaintiffs' and the defendants' interpretations of the statutory language are facially plausible, the plaintiffs' reading of § 42-110g (a) is more reasonable. While the term "actual damages" is not defined in CUTPA, the term is used in other statutes in such a manner as to leave no doubt that actual damages include personal injuries. For example, General Statutes § 53-452 (a) provides in relevant part that "[a]ny person whose property *or person* is injured by [a

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[36] See R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2018– 19 Ed.) § 6.7, p. 850 (noting that Connecticut's trial courts are divided on this question).

computer crime committed in violation of] section 53-451 may bring a civil action in the Superior Court to enjoin further violations and to recover the *actual damages* sustained by reason of such violation . . . ." (Emphasis added.)

In addition, the plaintiffs' interpretation of the statute better comports with our analysis in *Hinchliffe* v. *American Motors Corp.*, supra, 184 Conn. at 612–20, 440 A.2d 810. In that case, we considered the closely related question of whether the "ascertainable loss" requirement means that a CUTPA plaintiff must be able to prove that he or she has suffered actual damages in a particular amount. *Id.*, at 612–13, 440 A.2d 810. We rejected that reading of the statute, concluding that the ascertainable loss and actual damage clauses of § 42-110g (a) serve distinct purposes and that the legislature did not intend the term "ascertainable" to modify "actual damages." *Id.*, at 613–15, 440 A.2d 810. We also cited favorably the view of one legal scholar that "the only function served by a threshold 'loss' requirement in a consumer protection statute is to guard against vicarious suits by self-constituted attorneys general when they spot an apparently deceptive advertisement in the newspaper, on television or in a store window." *Id.*, 615 n.6, 440 A.2d 810, citing D. Rice, "New Private Remedies for Consumers: The Amendment of Chapter 93A," 54 Mass. L.Q. 307, 314 (1969). That view, if correct, strongly supports the conclusion that the presence of the ascertainable loss clause in the statute in no way restricts the damages that are available to plaintiffs who have been directly and personally injured by an unfair trade practice.

Second, we frequently have remarked that "CUTPA's coverage is broad and its purpose remedial." (Internal

quotation marks omitted.) *Cheshire Mortgage Service, Inc.* v. *Montes*, 223 Conn. 80, 113–14, 612 A.2d 1130 (1992); see also 12 R. Langer et al., supra, § 2.5, p. 81. As we explained in part IV A of this opinion, whereas unfair trade practices such as false advertising and other forms of commercial deception tend to result primarily in financial harm, a principal evil associated with unethical and unscrupulous advertising is that viewers or innocent third parties will be physically injured as a result of dangerous or illegal conduct depicted in the advertisements. See, e.g., *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556–61, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). That is precisely what the plaintiffs in the present case allege. If personal injuries are not recoverable under those circumstances, then no recovery will be available for a substantial category of unfair trade practices, and the threat of private litigation will not serve as a deterrent to such conduct. That outcome would be inconsistent with the stated intent of the legislature to provide broad protection from unfair trade practices and to incentivize private enforcement of the law.

Third, it is well established that the legislature intended that Federal Trade Commission (FTC) rulings and cases decided under the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 41 et seq. (2012 and Supp. V 2017), would "serve as a lodestar" for interpreting CUTPA's open-ended language.[37] *Russell* v. *Dean Witter*

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[37] General Statutes § 42-110b (b) provides in relevant part that "[i]t is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5 (a) (1) of the Federal Trade Commission Act . . . ."

*Reynolds, Inc.*, 200 Conn. 172, 179, 510 A.2d 972 (1986).[38] Notably, the FTC itself has construed the FTC Act as prohibiting practices that are physically dangerous to consumers. See J. Beales III, "Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present," 12 Geo. Mason L. Rev. 873, 876 (2004). In *In re International Harvester Co.*, 104 F.T.C. 949 (1984), for example, the FTC held that a manufacturer's failure to adequately disclose safety risks associated with fuel geysering in its tractors represented an unfair trade practice that violated the FTC Act. See *Id.* In reaching this conclusion, the FTC relied on the fact that fuel geysering is a hazard that creates a substantial risk of injury or death: "There clearly has been serious consumer injury. At least one person has been killed and eleven others burned. . . . Many of the burn injuries have been major ones, moreover, resulting in mobility limitations, lasting psychological harm, and severe disfigurement. . . . These injuries are of a kind that satisfies the . . . unfairness test. It is true that they involve physical rather than economic injury, but the [u]nfairness [s]tatement reaches such matters." (Citations omitted.) *Id.*, at 1064; see also *In re LabMD, Inc.*, Docket No. 9357, 2016 WL 521327, *12 (F.T.C. January 14, 2016) ("unquantifiable health and safety risks" can give rise to unfair trade practice injuries).

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[38] We recognize that the FTC Act does not authorize a private right of action and, therefore, that neither the FTC nor the federal courts, in construing the FTC Act, have confronted the issue of whether a plaintiff harmed by immoral marketing practices may recover for resulting personal injuries. Nevertheless, we find it instructive that the FTC Act has been construed to apply to unethical and unscrupulous marketing and other unfair trade practices that are likely to result in primarily physical harms. See, e.g., *In re International Harvester Co.*, supra, 104 F.T.C. at 1064.

Of particular relevance to the present action, the FTC has, on multiple occasions, found violations of the FTC Act when companies have advertised or promoted their products in a manner that is likely to result in physical injury, even in the absence of product sales. For example, the FTC has required companies to refrain from advertising that depicts young children operating bicycles and tricycles in an unsafe or unlawful manner; *In re AMF, Inc.*, 95 F.T.C. 310, 313–15 (1980); advertising the use of electric hairdryers by children in close proximity to a filled bathroom sink; See *In re Mego International, Inc.*, 92 F.T.C. 186, 187, 189–90 (1978); and advertising that depicts children attempting to cook food without close adult supervision; *In re Uncle Ben's, Inc.*, 89 F.T.C. 131, 136 (1977); as well as promotional giveaways that expose young children to unguarded razor blades. See *In re Philip Morris, Inc.*, 82 F.T.C. 16, 19 (1973). The FTC concluded that such marketing activities had the tendency to induce behavior that involves an unreasonable risk of harm to person or property and, therefore, constituted unfair trade practices.

In 1997, Federal Trade Commissioner Roscoe B. Starek III underscored the FTC's interest in combating unfair trade practices that may result in physical injuries to children: "Although injury must be both substantial and likely" to draw the FTC's attention, "unwarranted health or safety risks can suffice." R. Starek III, "The ABCs at the FTC: Marketing and Advertising to Children," Address at the Minnesota Institute of Legal Education (July 25, 1997), available at https://www.ftc.gov/public-statements/1997/07/abcs-ftc-marketing-and-advertising-children (last visited March 8, 2019). More recently, the FTC has taken an interest in the marketing of violent movies, songs, and video games

to children. See, e.g., Federal Trade Commission, Report to Congress, "Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (December, 2009), available at 2009 WL 5427633. It is clear, then, that wrongful advertising that poses a genuine risk of physical harm falls under the broad purview of the FTC Act and, by incorporation, CUTPA.

Fourth, we observe that courts in several of our sister states have concluded that victims of unfair trade practices may recover for personal injuries. See, e.g., *Pope* v. *Rollins Protective Services Co.*, 703 F.2d 197, 203 (5th Cir. 1983) (applying Texas law); *Maurer* v. *Cerkvenik-Anderson Travel, Inc.*, 181 Ariz. 294, 297–98, 890 P.2d 69 (App. 1994); *Maillet* v. *ATF-Davidson Co.*, 407 Mass. 185, 192, 552 N.E.2d 95 (1990). Although we recognize that the statutory language at issue in those cases was not identical to the language at issue in this case, we nevertheless find it significant that sister courts have understood personal injuries to fall within the scope of the harms to which broadly worded consumer protection statutes are directed. In addition, we note that a majority of Connecticut trial courts addressing the issue have concluded that damages for personal injuries can be recovered under CUTPA. 12 R. Langer et al., supra, § 6.7, p. 850. For all of these reasons, we conclude that, at least with respect to wrongful advertising claims, personal injuries alleged to have resulted directly from such advertisements are cognizable under CUTPA.

## V
## WRONGFUL DEATH AND CUTPA: ISSUES OF FEDERAL LAW

Having concluded that the plaintiffs have pleaded legally cognizable CUTPA claims sounding in wrongful marketing, we next consider whether the trial court properly determined that PLCAA does not bar the plaintiffs' wrongful death claims. Our review of the federal statute persuades us that the trial court correctly concluded that CUTPA, as applied to the plaintiffs' allegations, falls within one of PLCAA's exceptions.

### A
### PLCAA Overview

PLCAA generally affords manufacturers and sellers of firearms[39] immunity from civil liability arising from the criminal or unlawful use of their products by third parties. 15 U.S.C. §§ 7902 (a) and 7903 (5) (A) (2012).[40] Congress carved out six exceptions to this immunity, pursuant to which firearms sellers may be held liable for third-party crimes committed with their products. See 15 U.S.C. § 7903 (5) (A) (2012). The exception at issue in the present case, the predicate exception; see footnote 12 of this opinion and accompanying text; permits civil

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[39] The statute applies to sales of both firearms and ammunition. See, e.g., 15 U.S.C. § 7903 (4) (2012). In the interest of simplicity, we use the term "firearm" to encompass ammunition as well.

[40] The law provides that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902 (a) (2012). "The term 'qualified civil liability action' means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party . . . ." 15 U.S.C. § 7903 (5) (A) (2012).

actions alleging that "a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought . . . ." 15 U.S.C. § 7903 (5) (A) (iii) (2012). The question presented by this appeal is whether CUTPA qualifies as such a predicate statute, that is, a "statute *applicable* to the sale or marketing of [firearms] . . . ." (Emphasis added.) 15 U.S.C. § 7903 (5) (A) (iii) (2012). The answer to this question necessarily hinges on the meaning and scope of the statutory term "applicable." See *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1133 (9th Cir. 2009), cert. denied, 560 U.S. 924, 130 S.Ct. 3320, 176 L.Ed.2d 1219 (2010).

"[W]e begin by setting forth the rules and principles that govern our interpretation of federal law. With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule . . . ." (Internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 140, 172 A.3d 1228 (2017). "Under the [federal] plain meaning rule, [l]egislative history and other tools of interpretation may be relied [on] only if the terms of the statute are ambiguous." (Internal quotation marks omitted.) *Webster Bank* v. *Oakley*, 265 Conn. 539, 555, 830 A.2d 139 (2003), cert. denied, 541 U.S. 903, 124 S.Ct. 1603, 158 L.Ed.2d 244 (2004). "If the text of a statute is ambiguous, then we must construct an interpretation consistent with the primary purpose of the statute as a whole. . . . Thus, our interpretive process will begin by inquiring whether the plain language of [the] statute, when given its ordinary, common meaning . . . is ambiguous." (Citations omitted; internal quotation marks omitted.) *Id.*, at 555–56, 830 A.2d 139. In assessing ambiguity, the meaning of the

statute must be evaluated not only by reference to the language itself but also in the specific context in which that language is used, as well as in the broader context of the statute as a whole. *New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 400 (2d Cir. 2008), cert. denied, 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009).

B

The Plain Language of the Statute

Both the plaintiffs and the defendants' contend that the plain language of the predicate exception, read in the context of the broader statute, unambiguously favors their position. In this part of the opinion, we explain why the plaintiffs' interpretation of the statutory language is plainly the more reasonable one. We consider the text of the predicate exception itself, the broader statutory framework, the congressional statement of findings and purposes, and the defendants' argument that treating CUTPA as a predicate statute would lead to absurd results.

Although we agree with the plaintiffs that their reading of the statutory language is the better one, we recognize that the defendants' interpretation is not implausible. Therefore, in part V C of the opinion, we also review various extrinsic sources of congressional intent to resolve any ambiguities. Our review of both the statutory language and these extrinsic sources persuades us that Congress did not mean to preclude actions alleging that firearms companies violated state consumer protection laws by promoting their weapons for illegal, criminal purposes.

1

The Predicate Exception

When construing a federal law in which key terms are undefined, we begin with the ordinary, dictionary meaning of the statutory language. See, e.g., *Maslenjak* v. *United States*, --- U.S. ---, 137 S.Ct. 1918, 1924, 198 L.Ed.2d 460 (2017). Looking to dictionaries that were in print around the time PLCAA was enacted, we find that the principal definition of "applicable" is simply "[c]apable of being applied . . . ." Black's Law Dictionary (10th Ed. 2014) p. 120; accord Webster's Third New International Dictionary (2002) p. 105.

If Congress had intended to create an exception to PLCAA for actions alleging a violation of any law that is capable of being applied to the sale and marketing of firearms, then there is little doubt that state consumer protection statutes such as CUTPA would qualify as predicate statutes. CUTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of *any trade or commerce.*" (Emphasis added.) General Statutes § 42-110b (a). Accordingly, the statute clearly is capable of being applied to the sale and marketing of firearms. The only state appellate court to have reviewed the predicate exception construed it in this manner; see *Smith & Wesson Corp.* v. *Gary*, 875 N.E.2d 422, 431, 434–35 and n.12 (Ind. App. 2007) (predicate exception unambiguously applies to any state law capable of being applied to sale or marketing of firearms), transfer denied, 915 N.E.2d 978 (Ind. 2009).

It is true that secondary dictionary definitions of "applicable" might support a narrower reading of the predicate exception. Webster's Third New International Dictionary, for example, also defines "applicable" as "fit, suitable, or right to be applied: appropriate . . . relevant .

. . ." Webster's Third New International Dictionary, supra, p. 105. Pursuant to such definitions, the Ninth Circuit concluded, it would not be unreasonable to read PLCAA to exempt only those state laws that are *exclusively* relevant to the sale or marketing of firearms. See *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1134.

If Congress had intended to limit the scope of the predicate exception to violations of statutes that are *directly*, *expressly*, or *exclusively* applicable to firearms, however, it easily could have used such language, as it has on other occasions.[41] The fact that the drafters opted instead to use only the term "applicable," which is susceptible to a broad reading, further supports the plaintiffs' interpretation. See, e.g., *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183 ("the legislature knows how to . . . use broader or limiting terms when it chooses to do so" [citation omitted]), cert. denied, 568 U.S. 940, 133 S.Ct. 425, 184 L.Ed.2d 255 (2012).

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[41] See, e.g., 15 U.S.C. § 6211 (9) (2012) (for purposes of international antitrust enforcement assistance, defining "regional economic integration organization" as "an organization that is constituted by, and composed of, foreign states, and on which such foreign states have conferred sovereign authority to make decisions that are . . . directly applicable to and binding on persons within such foreign states"); 22 U.S.C. § 283ii (a) (2012) ("securities guaranteed by the [Inter-American Investment] Corporation as to both principal and interest to which the commitment in article II, section 2 (e) of the agreement [establishing that Corporation] is expressly applicable," are exempt from rules governing domestic securities); 26 U.S.C. § 833 (c) (4) (B) (i) (2012) (health insurance organization is treated as existing Blue Cross or Blue Shield organization for tax purposes if it is "organized under, and governed by, State laws which are specifically and exclusively applicable to not-for-profit health insurance or health service type organizations").

2

The Statutory Framework

In construing the predicate exception, we also must consider the broader statutory framework. The plaintiffs' contention that CUTPA qualifies as a predicate statute as applied to their wrongful marketing claims finds additional support in the repeated statutory references to laws that govern the marketing of firearms.

There is no doubt that statutes that govern the advertising and marketing of firearms potentially qualify as predicate statutes. The predicate exception expressly provides that the "qualified civil liability actions" from which firearms sellers are immune shall not include "an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or *marketing* of the [firearm] . . . ."[42] (Emphasis added.) 15 U.S.C. § 7903 (5) (A) (iii) (2012).

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[42] We recognize that the term "marketing" is facially ambiguous. One dictionary in print at the time the statute was enacted defines "marketing" as follows: "1. The act or process of buying and selling in a market. 2. The commercial functions involved in transferring goods from producer to consumer. 3. The promotion of sales of a product, as by advertising and packaging." The American Heritage College Dictionary (4th Ed. 2007) p. 847. Notably, whereas the first two definitions are roughly synonymous with the general concepts of distribution and sales, the third is limited to advertising and other purely promotional functions. In context, however, it is clear that the term "marketing" is used in PLCAA in the third, narrower sense. As we noted, the predicate exception refers to statutes "applicable to the sale or marketing of" firearms. 15 U.S.C. § 7903 (5) (A) (iii) (2012). Elsewhere, PLCAA refers to "[b]usinesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products . . . ." 15 U.S.C. § 7901 (a) (5) (2012). If the term "marketing" had been meant to encompass sales and distribution, as well as

Importantly, however, at the time PLCAA was enacted, no federal statutes directly or specifically regulated the marketing or advertising of firearms. In addition, only a handful of states have enacted firearm

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advertising and the like, then Congress' inclusion of the terms "sale" and "distribution" would be superfluous. See, e.g., *Milner* v. *Dept. of the Navy*, 562 U.S. 562, 575, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011) (citing *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 [2001], for proposition that statutes should be read to avoid making any provision superfluous).

In addition, there are several other provisions of the statute in which the drafters referred to the "sale" and "distribution" of firearms but did not mention "marketing." See, e.g., 15 U.S.C. § 7901 (a) (4) (2012); 15 U.S.C. § 7903 (1) (2012). We must assume that the drafters selected their language with conscious intent, and that the use of the additional term "marketing" in the predicate exception is meant to import a distinct meaning. See, e.g., *Russello* v. *United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983).

Our conclusion that the meaning of the term "marketing" is limited to advertising and promotional functions in the context of PLCAA finds additional support in the 2018 edition of 22 C.F.R. § 123.4 (a) (3), which permits the temporary importation of certain defense articles, including arms, if an item "[i]s imported for the purpose of exhibition, demonstration or marketing in the United States and is subsequently returned to the country from which it was imported . . ." This is consistent with the more restrictive definition of "marketing" in other federal regulations. See, e.g., 45 C.F.R. § 164.501 (2018). Several recently proposed federal bills that would have regulated the firearms industry provide further support. H.R. 5093, 113th Cong. (2014), for example, which would have directed the FTC to "promulgate rules . . . to prohibit any person from marketing firearms to children"; *id.*, § 2 (a); barred advertising practices such as "the use of cartoon characters to promote firearms and firearms products." *Id.*, § 2 (a) (1). Also instructive is H.R. 2089, 115th Cong. (2017). One provision of that bill would have prohibited "the manufacture, importation, sale, or purchase by civilians of the Five-seveN Pistol . . . ." *Id.*, § 2 (b) (2). Another provision references "the current or historical marketing of the firearm's capabilities . . . ." *Id.*, § 3 (b).

specific laws that address in any way the marketing function, and none of those purports to comprehensively regulate the advertising of firearms.[43] It would have made little sense for the drafters of the legislation to carve out an exception for violations of laws applicable to the marketing of firearms if no such laws existed.[44]

If Congress intended the predicate exception to encompass laws that prohibit the wrongful marketing of firearms, and if no laws expressly and directly do so, then the only logical reading of the statute is that Congress had some other type of law in mind. What type? At both the federal and state levels, false, deceptive, and other forms of wrongful advertising are regulated principally through unfair trade practice laws such as the FTC Act and its state analogues.[45] We must presume that Congress was aware, when it enacted PLCAA, that both the FTC Act and state analogues such as CUTPA have

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[43] See Cal. Bus. & Prof. Code § 5272.1 (c) (2) (Deering Supp. 2018) (prohibiting firearms advertisements at public, multimodal transit facilities); N.J. Admin. Code § 13:54-5.6 (2007) (establishing requirements for newspaper advertisements of machine guns, assault firearms, and semiautomatic rifles); R.I. Gen. Laws § 11-47-40 (b) (2002) (regulating advertisement of concealable firearms).

[44] Clearly, as one original cosponsor of the bill that became PLCAA; S. 397, 109th Cong. (2005); explained, legislators were of the view that such laws do exist: "[P]laintiffs are demanding colossal monetary damages and a broad range of injunctive relief . . . . These injunctions would relate to the design, manufacture, distribution, *marketing*, and the sale of firearms. *We already have laws that cover all of that.*" (Emphasis added.) 151 Cong. Rec. 17,371 (2005), remarks of Senator Jefferson Beauregard Sessions III.

[45] See, e.g., R. Petty, "Supplanting Government Regulation with Competitor Lawsuits: The Case of Controlling False Advertising," 25 Ind. L. Rev. 351, 359 (1991); M. Meaden, Comment, "Joe Camel and the Targeting of Minors in Tobacco Advertising: Before and After *44 Liquormart* v. *Rhode Island*," 31 New Eng. L. Rev. 1011, 1026–27 (1997).

long been among the primary vehicles for litigating claims that sellers of potentially dangerous products such as firearms have marketed those products in an unsafe and unscrupulous manner. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988) (Congress is presumptively knowledgeable about pertinent federal and state law). CUTPA, for example, has long been construed to incorporate the FTC's traditional "cigarette rule," which prohibits as unfair advertising that is, among other things, "immoral, unethical, oppressive and unscrupulous."[46]

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[46] The plaintiffs' CUTPA claim is predicated on their contention that the defendants' "unethically, oppressively, immorally, and unscrupulously promoted" the XM15-E2S. Commonly known as the "cigarette rule," that standard originated in a policy statement of the Federal Trade Commission issued more than one-half century ago; see Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964); and rose to prominence when mentioned in a footnote in *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n.5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972). The decades since have seen a move away from the cigarette rule at the federal level. See *Ulbrich* v. *Groth*, 310 Conn. 375, 474–77, 78 A.3d 76 (2013) (*Zarella, J.*, concurring in part and dissenting in part); 12 R. Langer et al., supra, § 2.2, pp. 39–45. That move culminated with a revision of the FTC Act by Congress in 1994, which codified the limitations on the FTC's authority to regulate unfair practices. See Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695, codified at 15 U.S.C. § 45 (n) (1994). This court has characterized the federal standard for unfair trade practices contained therein as "a more stringent test known as the substantial unjustified injury test," under which "an act or practice is unfair if it causes substantial injury, it is not outweighed by countervailing benefits to consumers or competition, and consumers themselves could not reasonably have avoided it." *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 622 n.13, 119 A.3d 1139 (2015).

*Ivey Barnum & O'Mara* v. *Indian Harbor Properties, Inc.*, 190 Conn. 528, 539 and n.13, 461 A.2d 1369 (1983).

Reading the predicate exception to encompass actions brought to remedy illegal and unscrupulous marketing practices under state consumer protection laws is consistent with the approach followed by the United States Court of Appeals for the Second Circuit, whose decisions "carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state

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The defendants' have not asked us to reexamine our continued application of the cigarette rule as the standard governing unfair trade practice claims brought under CUTPA, and, therefore, the issue is not presently before us. We recognize, however, that a question exists as to whether the cigarette rule should remain the guiding rule as a matter of state law. See, e.g., *id.*, ("[i]n light of our conclusion . . . that the plaintiffs' CUTPA claim fails even under the more lenient cigarette rule, it is unnecessary for us to decide whether that rule should be abandoned in favor of the federal test"); *Ulbrich* v. *Groth*, supra, 310 Conn. at 429, 78 A.3d 76 (declining to review "the defendants' unpreserved claim that the cigarette rule should be abandoned in favor of the substantial unjustified injury test"); *State* v. *Acordia, Inc.*, 310 Conn. 1, 29 n.8, 73 A.3d 711 (2013) (declining to "address the issue of the viability of the cigarette rule until it squarely has been presented"). At the same time, notwithstanding the questions raised in those decisions, we have continued to apply the cigarette rule as the law of Connecticut; see, e.g., *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 880, 124 A.3d 847 (2015); and, even though we have flagged the issue for reexamination by the legislature; see *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, supra, 317 Conn. at 622 n.13, 119 A.3d 1139; the legislature has continued to acquiesce in our application of the cigarette rule. In any event, even if we were to adopt the current federal standard governing unfair advertising, it would not bar the plaintiffs' CUTPA claims, as they have alleged that the defendants' engaged in trade practices that caused substantial, unavoidable injury and that were not outweighed by countervailing benefits. Still, on remand, the defendants' are not foreclosed from arguing that a different standard should govern the plaintiffs' CUTPA claims.

courts." (Internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, supra, 327 Conn. at 140, 172 A.3d 1228. In *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 384, the Second Circuit considered whether PLCAA barred the municipal plaintiffs' action alleging that distribution practices of the defendant firearms manufactures and sellers violated a New York criminal nuisance statute; see N.Y. Penal Law § 240.45 (McKinney 2008); by marketing guns to legitimate buyers with the knowledge that those guns will be diverted into illegal markets. See *New York* v. *Beretta U.S.A. Corp.*, supra, at 389–90. The court concluded that the action should have been dismissed because the nuisance statute was a law of general applicability that had never been applied to the firearms trade and simply did not "encompass the conduct of firearms manufacturers of which the [municipal plaintiffs] complain[ed]." *Id.*, at 400. Notably, in reaching that conclusion, the Second Circuit held that the predicate exception encompasses not only laws that expressly regulate commerce in firearms but also those that "clearly can be said to implicate the purchase and sale of firearms," as well as laws of general applicability that "courts have applied to the sale and marketing of firearms . . . ."[47] *Id.*, at 404. CUTPA falls squarely into both of these categories.

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[47] Although the Ninth Circuit construed the predicate exception more narrowly, that court also rejected a reading that would limit predicate statutes to those that pertain exclusively to the sale or marketing of firearms, recognizing that other statutes that regulate "sales and manufacturing activities" could qualify. *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1134; see also *id.*,at 1137 (legislative history indicates intent to restrict liability to "statutory violations concerning firearm[s] regulations *or sales and marketing regulations*" [emphasis added]). In *Ileto*, the Ninth Circuit held that

Statutes such as the FTC Act and state analogues that prohibit the wrongful marketing of dangerous consumer products such as firearms represent precisely the types of statutes that implicate and have been applied to the sale and marketing of firearms. In the early 1970s, for example, the FTC entered into consent decrees with three firearms sellers relating to allegations that they had precluded their dealers from advertising their guns at lower than established retail prices.[48] A few years later, the FTC ordered Emdeko International, Inc., a marketing company, to refrain from predatory and misleading advertising regarding various consumer products, including firearms. See *In re National Housewares, Inc.*, 90 F.T.C. 512, 516, 587–88, 601–603 (1977).

CUTPA also has been applied to the sale of firearms. For example, in *Salomonson* v. *Billistics, Inc.*, Superior Court, Judicial District of New London, Docket No. CV-88-508292, 1991 WL 204385 (September 27, 1991), the plaintiff prevailed on his claim that the defendant gun dealer's sales practices relating to the sale of a Ruger pistol and three remanufactured semiautomatic rifles

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the California laws at issue did not qualify as predicate statutes, but it reached that conclusion primarily because (1) California had codified its common law of tort, which remained subject to judicial evolution; *id.*, at 1135–36; and (2) during the legislative debates, members of Congress had referenced that very case as an example of one that PLCAA would preclude. *Id.*, at 1137. In other words, the fact the California statutes at issue were, in a sense, merely general tort theories masquerading as statutes meant that the plaintiffs' claims were precisely the sort that Congress intended to preempt.

[48] See *In re Colt Industries Operating Corp.*, 84 F.T.C. 58, 61–62 (1974); *In re Browning Arms Co.*, 80 F.T.C. 749, 752 (1972); *In re Ithaca Gun Co.*, 78 F.T.C. 1104, 1107–1108 (1971).

violated CUTPA.[49] *Id.* The court specifically found that the defendant's conduct was "oppressive" and, therefore, violated the second prong of the cigarette rule, the same standard at issue in the present case. *Id.*

Equally important, regulation of firearms advertising in our sister states frequently has been accomplished under the auspices of state consumer protection and unfair trade practice laws.[50] It is clear, therefore, that

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[49] In another Connecticut case, *Ganim* v. *Smith & Wesson Corp.*, supra, 258 Conn. at 313, 780 A.2d 98, the plaintiffs asserted CUTPA claims similar to those at issue in the present case, alleging, among other things, that misleading and unscrupulous firearms advertising contributed to gun violence. *Id.*, at 334–35, 780 A.2d 98. Because the municipal plaintiffs lacked standing, however, we did not rule on the validity of their CUTPA claims. See *id.*, at 343, 373, 780 A.2d 98.

A CUTPA violation also was alleged on the basis of conduct similar to that at issue in the present case in *Wilson v. Midway Games, Inc.*, 198 F. Supp.2d 167 (D. Conn. 2002). In that case, the plaintiff's son had been stabbed to death by a friend who had become obsessed with a violent interactive video game. *Id.*, at 169. The plaintiff alleged, among other things, that the defendant manufacturer of that game violated CUTPA by aggressively and inappropriately marketing the game to a vulnerable adolescent audience. See *id.*, at 175–76. The court dismissed the CUTPA claim for failure to comply with CUTPA's statute of limitations. *Id.*, at 176. In *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 117 F. Supp.2d 167, 170–71 (D.Conn. 2000), by contrast, the court denied a motion to dismiss the plaintiff's claim that the defendant violated CUTPA by unethically marketing tobacco products to minors.

[50] See, e.g., *Melton* v. *Century Arms, Inc.*, 243 F. Supp.3d 1290, 1306 (S.D. Fla. 2017) (defective design action in which plaintiffs stated cognizable claim under Florida unfair trade practice law that, among other things, advertising falsely represented that AK-47 rifles are safe); *Beretta U.S.A. Corp.* v. *Federal Ins. Co.*, 117 F. Supp.2d 489, 490, 492 (D. Md. 2000) (firearms manufacturer sought defense and indemnification in underlying state actions alleging, among other things, that manufacturer falsely advertised that gun ownership and possession increased one's security), aff'd, 17 Fed. Appx. 250 (4th Cir. 2001); *People* v. *Arcadia Machine & Tool, Inc.*, Docket No. 4095,

consumer protection statutes such as CUTPA long have been an established mechanism for regulating the marketing and advertising schemes of firearms vendors.

The FTC Act and its various state analogues also have been applied in numerous instances to the wrongful marketing of other potentially dangerous consumer products, especially with respect to advertisements that promote unsafe or illegal conduct.[51] See S. Calkins, "FTC

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2003 WL 21184117, *15, 22, 26–27 (Cal. Super. April 10, 2003) (granting summary judgment for defendant manufacturers because plaintiffs failed to present evidence that [1] reasonable consumers would be misled by defendants' advertisements, or [2] California public policy disapproved of marketing firearms to children, but allowing case to proceed against defendant distributors accused of advertising banned assault weapons), aff'd sub nom. *In re Firearm Cases*, 126 Cal. App. 4th 959, 992, 24 Cal. Rptr.3d 659 (2005); Opinions, N.M. Atty. Gen. No. 77-23 (July 19, 1977) p. 149 (advertising illegal sale of firearms in liquor establishment would constitute unfair or deceptive trade practice); see also *FN Herstal, S.A.* v. *Clyde Armory, Inc.*, 123 F. Supp.3d 1356, 1376 (M.D. Ga. 2015) (trademark infringement action), aff'd, 838 F.3d 1071 (11th Cir. 2016), cert. denied, --- U.S. ---, 137 S.Ct. 1436, 197 L.Ed.2d 649 (2017); *American Shooting Sports Council, Inc.* v. *Attorney General*, 429 Mass. 871, 875, 711 N.E.2d 899 (1999) (attorney general may regulate firearms sales and marketing pursuant to state unfair trade practice law in order to address sale of products that do not perform as warranted, including those that pose safety and performance issues, as well as those that legislature has defined as unlawful).

[51] See, e.g., *In re MACE Security International, Inc.*, 117 F.T.C. 168, 169–72, 181–84 (1994) (advertisements made unsubstantiated claims that single, poorly directed spray of self-defense chemical would instantly stop assailants); *In re Benton & Bowles, Inc.*, 96 F.T.C. 619, 622–24 (1980) (advertisements depicting children riding bicycles unsafely or illegally); *In re AMF, Inc.*, supra, 95 F.T.C. at 313–15 (advertisements representing young children riding bicycles and tricycles in improper, unsafe or unlawful manner); *In re Mego International, Inc.*, supra, 92 F.T.C. at 189–90 (advertisements depicting children using electrical toys and appliances near water without adult supervision); *In re Uncle Ben's, Inc.*, supra, 89 F.T.C.

Unfairness: An Essay," 46 Wayne L. Rev. 1935, 1962, 1974 (2000). Although Congress temporarily curtailed the FTC's authority to regulate unfair commercial advertising in 1980, that authority was reinstated in 1994. *Id.*, 1954–55.

Subsequently, just a few years before Congress began considering predecessor legislation to PLCAA, the FTC entered into a new consent decree addressing wrongful advertising. In *In re Beck's North America, Inc.*, 127 F.T.C. 379 (1999), the commission prohibited the publication of advertisements that portrayed young adult passengers consuming alcohol while sailing, in a manner that was unsafe and depicted activities that "may also violate federal and state boating safety laws." *Id.*, at 380. The consent decree prohibited the "future dissemination . . . of any . . . advertisement that . . . depicts activities that would violate [federal laws that make] it illegal to operate a vessel under the influence of alcohol or illegal drugs." (Citations omitted.) *In re Beck's North America, Inc.*, File No. 982-3092, 1998 FTC LEXIS 83, *15–16, 1998 WL 456483, *6-7 (F.T.C. August 6, 1998). More generally, the FTC cautioned that it "ha[d] substantial concern about advertising that depicts conduct that poses a high risk to health and safety. As a

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at 136 (advertisements depicting children attempting to cooking food without close adult supervision); *In re Hudson Pharmaceutical Corp.*, 89 F.T.C. 82, 86–89 (1977) (advertisements that might induce children to take excessive amounts of vitamin supplements); *In re General Foods Corp.*, 86 F.T.C. 831, 839–40 (1975) (advertisements depicting consumption of raw plants growing in wild or natural surroundings); but see J. Vernick et al., "Regulating Firearm Advertisements That Promise Home Protection: A Public Health Intervention," 277 JAMA 1391, 1396 (1997) (for unstated reasons, FTC did not act on request by various advocacy groups to adopt rules regulating firearm advertising).

result, the [FTC] will closely scrutinize such advertisements in the future." *Id.*, at *6, 1998 FTC LEXIS 83, at *15.[52]

Because Congress clearly intended that laws governing the marketing of firearms would qualify as predicate statutes, and because Congress is presumed to be aware that the wrongful marketing of dangerous items such as firearms for unsafe or illegal purposes traditionally has been and continues to be regulated primarily by consumer protection and unfair trade practice laws rather than by firearms specific statutes, we conclude that the most reasonable reading of the statutory framework, in light of the decision of the Second Circuit in *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 384, is that laws such as CUTPA qualify as predicate statutes, insofar as they apply to wrongful advertising claims.[53]

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[52] Since that time, the FTC also has taken an interest in the marketing of violent video games to children. See generally Federal Trade Commission, Report to Congress, supra, 2009 WL 5427633.

[53] As we previously noted; see footnote 47 of this opinion; although the Ninth Circuit has construed the predicate exception more narrowly than has the Second Circuit, CUTPA also might well qualify as a predicate statute under the standard articulated in the Ninth Circuit's decision in *Ileto*. Specifically, the court suggested that a predicate statute must either concern "firearm[s] regulations *or sales and marketing regulations*." (Emphasis added.) *Ileto* v. *Glock, Inc.*, 565 F.3d at 1137; see also *id.*, at 1134 (statutory examples of predicate statutes "target the firearms industry specifically" or "pertain specifically to sales and manufacturing activities"). Accordingly, insofar as CUTPA specifically regulates commercial sales activities and is, therefore, narrower in scope and more directly applicable than the general tort and nuisance statutes at issue in *Ileto*, it arguably qualifies as a predicate statute under the standards articulated by each of the three appellate courts to have construed the federal statute.

The Statement of Findings and Purposes

When it drafted PLCAA, Congress included a statement of findings and purposes. See 15 U.S.C. § 7901 (2012). In his dissenting opinion, Justice Robinson reads this statement to support the position of the defendants'. On balance, however, we conclude, for the following reasons, that the congressional findings and purposes also lend support to the plaintiffs' interpretation of the statute.

First, Title 15 of the 2012 edition of the United States Code, § 7901 (a) (4), provides that "[t]he *manufacture, importation, possession, sale, and use* of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws . . . [s]uch [as] . . . the Gun Control Act of 1968, the National Firearms Act — and the Arms Export Control Act . . . ." (Citations omitted; emphasis added.) Notably, this provision, which expressly references various firearms specific laws, makes no mention of the marketing function. By contrast, the very next finding expressly references the "lawful . . . marketing — of firearms . . . ."[54] 15 U.S.C. § 7901 (a) (5) (2012). Reading these two findings in concert, it is clear that Congress chose not to abrogate the well established duty of firearms sellers to market their wares legally and responsibly, even though no

[54] Title 15 of the 2012 edition of the United States Code, § 7901 (a) (5), provides: "Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended."

federal laws specifically govern the marketing of firearms.

Second, although the findings indicate that Congress sought to immunize the firearms industry from liability for third-party criminal conduct, they emphasize that that immunity extended only to "harm that is *solely* caused by others . . . ." (Emphasis added.) 15 U.S.C. § 7901 (a) (6) (2012); see also 15 U.S.C. § 7901 (b) (1) (2012) (principal purpose of PLCAA is to prohibit causes of action "for the harm *solely* caused by the criminal or unlawful misuse of firearm products" [emphasis added]); *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1158 (Berzon, J., concurring in part and dissenting in part) (same). The statement of findings and purposes further provides that the purpose of PLCAA is "[t]o preserve a citizen's access to a supply of firearms and ammunition for all *lawful* purposes, including hunting, self- defense, collecting, and competitive or recreational shooting." (Emphasis added.) 15 U.S.C. § 7901 (b) (2) (2012). In the present case, the plaintiffs allege that the defendants' *illegally* marketed the XM15-E2S by promoting its criminal use for offensive civilian assaults, and that this wrongful advertising was a direct cause of the Sandy Hook massacre. At no time and in no way does the congressional statement indicate that firearm sellers should evade liability for the injuries that result if they promote the illegal use of their products.

Third, the findings make clear that Congress sought to preclude only novel civil actions that are "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law," recognition of which "would expand civil liability in a manner never contemplated . . . by Congress . . . or by

the legislatures of the several States." 15 U.S.C. § 7901 (a) (7) (2012). As we previously discussed, however, it is well established that the FTC Act and state analogues such as CUTPA not only govern the marketing of firearms, but also prohibit advertisements that promote or model the unsafe or illegal use of potentially dangerous products. Accordingly, there is simply no reason to think that the present action represents the sort of novel civil action that Congress sought to bar.[55]

The dissent relies on one other provision of the statement of findings and purposes that purportedly disqualifies CUTPA, as applied to the plaintiffs' wrongful marketing theory, as a potential predicate statute.

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[55] The standards embodied in the cigarette rule have been established law—first federal, and then state—for nearly six decades. As one legal scholar has explained, "at one time challenges to the depiction of unsafe practices in advertisements [were] a staple of [FTC] unfairness enforcement . . . ." (Footnote omitted.) S. Calkins, supra, 46 Wayne L. Rev. 1974. Moreover, even under the current federal unfairness standard, one of the FTC's primary areas of focus in challenging unfair trade practices has been "advertising that promotes unsafe practices." *Id.*, 1962. The plaintiffs merely seek to apply these established legal principles to the marketing of assault weapons, products that are at least as dangerous as any that have been the subject of prior FTC enforcement actions.

During the legislative debates, the author of PLCAA made clear that all the law sought to preclude was novel causes of action, rather than specific applications of established legal principles: "Plaintiffs can still argue their cases for violations of law . . . The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle." 151 Cong. Rec. 18,096 (2005), remarks of Senator Larry Edwin Craig. In fact, the plaintiffs' claims invoke a statutory cause of action that falls squarely within established consumer protection law. See, e.g., *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 117 F. Supp.2d 167, 170–71, 178 (D. Conn. 2000) (denying motion to dismiss claim that defendant violated CUTPA by unethically and unscrupulously marketing cigarettes to underage smokers and encouraging minors to violate law).

Specifically, the statement emphasizes the importance of preserving the rights enshrined in the second amendment to the United States constitution. See 15 U.S.C. § 7901 (a) (1), (2) and (6) (2012).

There is no doubt that congressional supporters of PLCAA were committed to Americans' second amendment freedoms and sought to secure those freedoms by immunizing firearms companies from frivolous lawsuits. It is not at all clear, however, that the second amendment's protections even extend to the types of quasi-military, semiautomatic assault rifles at issue in the present case. See *District of Columbia* v. *Heller*, 554 U.S. 570, 627, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (indicating that second amendment's protection does not extend to "'dangerous and unusual weapons'" and, therefore, that M16s and related military style rifles may be banned); *Kolbe* v. *Hogan*, 849 F.3d 114, 143 (4th Cir.) (reading *Heller* to mean that second amendment does not protect right to possess assault weapons featuring high capacity magazines, such as AR-15), cert. denied, --- U.S. ---, 138 S.Ct. 469, 199 L.Ed.2d 374 (2017); *New York State Rifle & Pistol Assn., Inc.* v. *Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015) (assuming for sake of argument that second amendment does apply to semiautomatic assault weapons such as AR-15 but upholding outright prohibitions against civilian ownership of such weapons), cert. denied sub nom. *Shew* v. *Malloy*, --- U.S. ---, 136 S.Ct. 2486, 195 L.Ed.2d 822 (2016); see also *Friedman* v. *Highland Park*, 784 F.3d 406, 410–12 (7th Cir.), cert. denied, --- U.S. ---, 136 S.Ct. 447, 193 L.Ed.2d 483 (2015); *Fyock* v. *Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015); *Heller* v. *District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011). Accordingly, we conclude that, on balance, PLCAA's statement of findings and purposes also bears

out the plaintiffs' interpretation of the statute, namely, that illegal marketing is not protected.[56]

4

Absurd Result

We next address the defendants' argument that construing a statute of general applicability such as CUTPA to be a predicate statute would lead to an absurd result. As one judge has articulated, "the predicate exception cannot possibly encompass every statute that might be 'capable of being applied' to the sale or

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[56] We further note that among the stated purposes of PLCAA was "[t]o protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely . . . ." 15 U.S.C. § 7901 (b) (5) (2012). We recognize that the advertisement and marketing of goods is a quintessential form of commercial speech under established first amendment jurisprudence. See, e.g., *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). At the same time, it is equally well settled that commercial speech that proposes an illegal transaction or that promotes or encourages an unlawful activity does not enjoy the protection of the first amendment. See, e.g., *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388–89, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); see also *Thompson* v. *Western States Medical Center*, 535 U.S. 357, 367, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002); *Lamar Outdoor Advertising, Inc.* v. *Mississippi State Tax Commission*, 701 F.2d 314, 321–22 (5th Cir. 1983). In reviewing the propriety of a motion to strike, we are obligated to assume the truth of the facts pleaded in the operative complaint. See, e.g., *Himmelstein* v. *Windsor*, supra, 304 Conn. at 307, 39 A.3d 1065. The plaintiffs' complaint in the present case alleges that the marketing in question promoted unlawful activity, namely, the civilian use of the XM15-E2S "as a combat weapon . . . for the purpose of waging war and killing human beings." Accordingly, the first amendment is not implicated by the claims as set forth by the plaintiffs in their complaint.

manufacture of firearms; if it did, the exception would swallow the rule, and no civil lawsuits would ever be subject to dismissal under . . . PLCAA." (Emphasis omitted.) *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1155 (Berzon, J., concurring in part and dissenting in part).

Of course, to surmount PLCAA immunity via the predicate exception, there must be at least a colorable claim that a defendant has, in fact, violated some statute, resulting in harm to the plaintiff. Accordingly, Judge Berzon's argument appears to be predicated on the assumptions that (1) most states have public nuisance statutes or similar laws, such as the California nuisance statutes at issue in *Ileto*, and (2) virtually any action seeking to hold firearms sellers liable for third-party gun violence could allege a colorable violation of those statutes because the mere act of selling the weapons involved might be deemed to create a public nuisance.

We will assume, without deciding, that Judge Berzon is correct that, as a general matter, the predicate exception cannot be so expansive as to fully encompass laws such as public nuisance statutes insofar as those laws reasonably might be implicated in any civil action arising from gun violence.[57] Although we believe that the

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[57] We note that the Second Circuit, in considering whether a criminal nuisance statute of general applicability qualified as a predicate statute, indicated that the relevant legal question is whether a statute is applicable to the sale or marketing of firearms as applied to the particular circumstances of the case at issue, rather than facially applicable. See *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 401 (discussing whether state statute at issue had been applied to firearms suppliers "for conduct like that complained of by the [plaintiff]"); *id.*, at 400–401 n.4 (in future, another statute of general applicability may be found to govern specific conduct complained of and, thus, qualify as predicate statute). We agree that that is the proper lens through which to consider the question, especially with respect to a statute such as CUTPA, which authorizes

plaintiffs' primary allegations—that any sale of assault weapons to the civilian market constitutes an unfair trade practice—would falter on this shoal, we need not address that issue more fully in light of our determination that those allegations are time barred. See part IV B of this opinion. What is clear, however, is that the plaintiffs' wrongful marketing allegations may proceed without crippling PLCAA. Those claims allege only that one specific family of firearms sellers advertised one particular line of assault weapons in a uniquely unscrupulous manner, promoting their suitability for illegal, offensive assaults. As we have stated throughout this opinion, we do not know whether the plaintiffs will be able to prove those allegations to a jury. But we are confident that this sort of specific, narrowly framed wrongful marketing claim alleges precisely the sort of illegal conduct that Congress did not intend to immunize. For this reason, CUTPA's prohibition against such conduct appears to fall squarely within the predicate exception and does not lead to an absurd result.

C

Extrinsic Evidence of Congressional Intent

Other courts that have construed the predicate exception are divided as to whether the exception unambiguously encompasses laws, such as CUTPA, that do not expressly regulate firearms sales and marketing but are nevertheless capable of being and have been applied thereto. Compare *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1133–35 (predicate exception is ambiguous), and *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 401 (same), with *Smith & Wesson Corp.* v. *Gary*, 875 N.E.2d 422, 431, 434 and n.12 (Ind.App. 2007) (predicate

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a cause of action that encompasses a number of distinct legal theories and principles. See 12 R. Langer et al., supra, § 2.1, p. 13.

exception unambiguously applies), and *New York* v. *Beretta U.S.A. Corp.*, supra, at 405–407 (Katzmann, J., dissenting) (same). In part V B of this opinion, we explained why the plain text of 15 U.S.C. § 7903 (5) (A) (iii) strongly suggests that CUTPA, as applied to the plaintiffs' claims, qualifies as a predicate statute. In this part, we explain why extrinsic indicia of congressional intent support the same conclusion. These indicia include canons of statutory construction, closely related legislation, and the legislative history of PLCAA.

1

Canons of Statutory Construction

Under the law of the Second Circuit, if the plain language of a statute is ambiguous, we then consider whether any ambiguities may be resolved by the application of canons of statutory construction and, failing that, through review of the legislative history. E.g., *United States* v. *Rowland*, 826 F.3d 100, 108 (2d Cir. 2016), cert. denied, --- U.S. ---, 137 S.Ct. 1330, 197 L.Ed. 2d 517 (2017). In the present case, three canons of construction are potentially relevant.

a

Clear Statement Requirement

We begin with the well established canon that a federal law is not to be construed to have superseded the historic police powers of the states unless that was the clearly expressed and manifest purpose of Congress. E.g., *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); *Federal Housing Finance Agency* v. *Nomura Holding America, Inc.*, 873 F.3d 85, 112 n.30 (2d Cir. 2017), cert. denied, --- U.S. ---, 138 S.Ct. 2679, 201 L.Ed.2d 1073 (2018), and cert. denied sub nom.

v. *Federal Housing Finance Agency*, --- U.S. ---, 138 S.Ct. 2697, 201 L.Ed.2d 1073 (2018). The regulation of advertising that threatens the public health, safety, and morals has long been considered a core exercise of the states' police powers. See, e.g., *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008); *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 611–12, 55 S.Ct. 570, 79 L.Ed. 1086 (1935); *Varney & Green* v. *Williams*, 155 Cal. 318, 321, 100 P. 867 (1909), overruled in part on other grounds by *Metromedia, Inc.* v. *San Diego*, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407 (1980); *State* v. *Certain Contraceptive Materials*, 7 Conn. Supp. 264, 277–78 (1939), rev'd on other grounds, 126 Conn. 428, 11 A.2d 863 (1940). Accordingly, we will find the plaintiffs' CUTPA action to be superseded by PLCAA only if that is the clearly expressed intent of Congress.[58]

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[58] Similar principles and presumptions apply if the issue is framed in terms of whether PLCAA preempts the plaintiffs' CUTPA action. As the United States Supreme Court recently explained, "[a]mong the background principles of construction that our cases have recognized are those grounded in the relationship between the [f]ederal [g]overnment and the [s]tates under [the United States] [c]onstitution. It has long been settled, for example, that we presume federal statutes do not . . . preempt state law . . . ." (Citations omitted.) *Bond* v. *United States*, 572 U.S. 844, 857–58, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014). The court further explained: "Closely related . . . is the [well established] principle that it is incumbent [on] the . . . courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers. . . . [W]hen legislation affect[s] the federal balance, the requirement of clear statement [ensures] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (Citations omitted; internal quotation marks omitted.) *Id.*, at 858, 134 S.Ct. 2077. These principles apply with particular force to congressional legislation that potentially intrudes into a field, such as advertising, that

In the case of PLCAA, there is no indication in the statutory text or statement of findings and purposes that Congress intended to restrict the power of the states to regulate wrongful advertising, particularly advertising that encourages consumers to engage in egregious criminal conduct. Indeed, sponsors of the legislation repeatedly emphasized during the legislative hearings that they did *not* intend to abrogate well established legal principles.[59] Accordingly, in the absence of a clear statement in the statutory text or legislative history that Congress intended to supersede the states' traditional authority to regulate the wrongful advertising of dangerous products such as firearms, we are compelled to resolve any textual ambiguities in favor of the plaintiffs.

b

Ejusdem Generis

The defendants' contend that a different canon of construction, namely, ejusdem generis, essentially resolves any statutory ambiguity in their favor. Specifically, from the fact that PLCAA provides two examples of predicate federal statutes, both of which specifically relate to firearms, the defendants' infer that all predicate statutes must be of that same ilk.[60] We are not persuaded.

When it drafted the predicate exception, Congress set forth two examples of statutes that are applicable to the

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traditionally has been occupied by the states. See *Altria Group, Inc.* v. *Good*, supra, 555 U.S. at 77, 129 S.Ct. 538.

[59] See, e.g., 151 Cong. Rec. 19,119 (2005), remarks of Senator John Thune; *id.*, 19,120, remarks of Senator Larry Edwin Craig.

[60] In part III of his dissenting opinion, Justice Robinson makes a similar point, although framed in terms of the closely related canon of noscitur a sociis.

sale or marketing of firearms. PLCAA provides that entities engaged in the firearms business are not immune from liability with respect to "an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm] . . . including—

"(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the [firearm], or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a [firearm]; or

"(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a [firearm], knowing, or having reasonable cause to believe, that the actual buyer of the [firearm] was prohibited from possessing or receiving a firearm . . . under subsection (g) or (n) of section 922 of title 18 [of the United States Code] . . . ."[61] 15 U.S.C. §

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[61] With respect to the unlawful buyer exception set forth in 15 U.S.C. § 7903 (5) (A) (iii) (II), the referenced subsections of 18 U.S.C. § 922 prohibit various persons, including convicted felons, illegal immigrants, and individuals indicted for felonies or addicted to controlled substances, from shipping, transporting, or receiving firearms in interstate commerce. 18 U.S.C. §§ 922 (g) and (n) (2012). The unlawful buyer exception thus directly references federal statutes that specifically regulate trade in firearms. Although the record keeping exception set forth in 15 U.S.C. § 7903 (5) (A) (iii) (I) does not expressly reference any specific statute, the language of that provision closely mirrors that of 18 U.S.C. § 922 (m), which mandates compliance with the record keeping requirements that govern federally licensed firearms dealers. Moreover, the legislative history indicates that Congress drafted 15 U.S.C. § 7903 (5) (A) (iii) (I) with an eye toward regulations such as 27 C.F.R. § 478.39a (a) (1),

7903 (5) (A) (iii) (2012) (setting forth record keeping and unlawful buyer exceptions).

The defendants' argue that we can discern the scope of the predicate exception by applying ejusdem generis. That canon applies when a statute sets forth a general category of persons or things and then enumerates specific examples thereof. In those cases, when the scope of the general category is unclear, a presumption, albeit a rebuttable one, may arise that the general category encompasses only things similar in nature to the specific examples that follow. See, e.g., 2A N. Singer & S. Singer, Statutes and Statutory Construction (7th Ed. 2014) § 47:17, pp. 364–68. Several courts have acknowledged the potential relevance of the canon when construing the predicate exception. See, e.g., *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 401–402. It is well established, however, that ejusdem generis, like other canons of construction, is merely a tool to assist us in gleaning the intent of Congress; it should not be applied in the face of a contrary manifestation of legislative intent. *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 88–89, 55 S.Ct. 50, 79 L.Ed. 211 (1934); 2A N. Singer & S. Singer, supra, § 47:22, pp. 400–404. This is particularly true, for example, when the legislative history of a statute reveals a contrary intent. See 2A N. Singer & S. Singer, supra, § 47:22, pp. 404–405.

In the case of PLCAA, the legislative history of the statute makes clear why Congress specifically chose to include the record keeping and unlawful buyer

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which mandates that licensed firearms dealers report lost or stolen weapons to the federal Bureau of Alcohol, Tobacco, Firearms and Explosives no more than forty-eight hours after the loss or theft is discovered. See 151 Cong. Rec. 18,937–38 (2005), remarks of Senator Larry Edwin Craig.

exceptions when drafting the final version of the predicate exception. Bills substantially similar to PLCAA had been introduced in both the 107th Congress and the 108th Congress. See S. 1805, 108th Cong. (2003), H.R. 1036, 108th Cong. (2003); H.R. 2037, 107th Cong. (2001). Those bills contained the same exemption for "State or Federal statute[s] applicable to the sale or marketing of [firearms]" that ultimately was codified at 15 U.S.C. § 7903 (5) (A) (iii). H.R. 2037, supra, § 4; accord S. 1805, supra, § 4; H.R. 1036, supra, § 4. Notably, however, they did not include the record keeping or the unlawful buyer exception. Indeed, they did not offer any specific examples of predicate statutes.

The legislative history indicates that the record keeping and unlawful buyer illustrations were added to the bill that became law during the 109th Congress not to define or clarify the narrow scope of the exception but, rather, because, in 2002, two snipers had terrorized the District of Columbia and surrounding areas. One of the snipers allegedly stole a Bushmaster XM-15 semiautomatic rifle identical or similar to the one at issue in the present case from a gun dealer with a history of lax inventory control procedures.[62] In 2003, the families of the victims of the sniper attacks brought a civil action against the gun dealer that ultimately resulted in a $ 2.5 million settlement.[63] During the legislative debates, many of the members who spoke in opposition to the bill that ultimately became PLCAA argued that the bill would have prevented victims of the sniper attacks from

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[62] See 151 Cong. Rec. 23,262 (2005), remarks of Representative Christopher Van Hollen; see also *id*., 23261 remarks of Representative Frank James Sensenbrenner, Jr.

[63] 151 Cong. Rec. 23,263 (2005), remarks of Representative Christopher Van Hollen.

bringing an action against that gun dealer, even though the dealer's carelessness had allowed the snipers to obtain the assault weapon.[64] Indeed, it was in part for that very reason, and the public outcry over the sniper attacks, that prior versions of the bill failed to pass.[65]

To deflect these potent political attacks, the author and other supporters of the 2005 incarnation of the bill pointed to the recently added record keeping and illegal buyer exception language as evidence that victims of the sniper attacks would not have been barred from pursuing their action under the predicate exception.[66] Indeed, several legislators strongly suggested that these examples of predicate statutes were specifically added to PLCAA to make clear that the lawsuits arising from the sniper attacks would not have been barred by PLCAA.[67]

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[64] See, e.g., 151 Cong. Rec. 19,131 (2005), remarks of Senator Barbara Boxer; *id.*, 23,278, remarks of Representative Rahm Emanuel.

[65] See 151 Cong. Rec. 17,372–73 (2005), remarks of Senator John Reed; *id.*, 23,263, remarks of Representative Christopher Van Hollen; H.R. Rep. No. 108-59, p. 98 (2003); J. Jiang, "Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?," 70 Alb. L. Rev. 537, 539–40 (2007).

[66] See, e.g., 151 Cong. Rec. 18,937 (2005), remarks of Senator Larry Edwin Craig (dealer violated federal record keeping laws); *id.*, 19,128, remarks of Senator Kathryn Ann Bailey Hutchison (dealer violated laws); *id.*, 23,261, remarks of Representative Frank James Sensenbrenner, Jr. (arguing that plaintiffs could have established record keeping violations and noting that federal Bureau of Alcohol, Tobacco, Firearms and Explosives report documented more than 300 such violations by dealer); see also *id.*, 18,112, remarks of Senator John William Warner (noting that both snipers were legally barred from purchasing firearms).

[67] See, e.g., 151 Cong. Rec. 23,020 (2005), remarks of Representative Phil Gingrey ("[t]his exception would specifically allow lawsuits against firearms dealers such as the dealer whose firearm ended up

The most reasonable interpretation of this legislative history, then, is that the record keeping and unlawful buyer illustrations were included in the final version of PLCAA not in an effort to define, clarify, or narrow the universe of laws that qualify as predicate statutes but, rather, simply to stave off the politically potent attack that PLCAA would have barred lawsuits like the one that had arisen from the widely reported Beltway sniper attacks. There is no other plausible explanation for why Congress chose to modify the predicate exception language contained in the 2001 and 2003 bills, which otherwise was "virtually identical" to the language in PLCAA. 151 Cong. Rec. 2561 (2005), remarks of Senator Larry Edwin Craig; see also *id.*, 18,096, remarks of Senator Craig (indicating that bill is same for all intents and purposes as version introduced during 108th Congress, with addition of clarifying examples).

This conclusion is bolstered by the fact that Congress was fully aware that there are many types of federal statutes and regulations, filling "hundreds of pages," that specifically govern the firearms industry. 151 Cong. Rec. 18,059 (2005), remarks of Senator Thomas Allen Coburn. Indeed, 18 U.S.C. § 922 is dedicated to delineating dozens of different unlawful acts relating to the production, distribution, and sale of firearms. Congress could have

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in the hands of the [Beltway] snipers who failed to maintain a required inventory list necessary to ensure that they are alerted to any firearm thefts"); *id.*, 23,273, remarks of Representative Frank James Sensenbrenner, Jr. ("this exception would specifically allow lawsuits against firearms dealers such as the dealer whose firearm ended up in the hands of the [Beltway] snipers"); see also *id.*, 18,066, remarks of Senator Dianne Feinstein (acknowledging that "new modifications" to legislation were directed toward sniper case); *id.*, 18,941, remarks of Senator Barbara Ann Mikulski (alluding to Beltway snipers in debating legislation).

simply identified 18 U.S.C. § 922, or the other federal firearms laws to which Senator Coburn alluded, as examples of predicate statutes. Instead, the author of PLCAA opted to highlight only the two specific subsections of 18 U.S.C. § 922—subsection (g) and (n)—that would have barred the Beltway snipers from obtaining the weapon used in the shootings.

Under similar circumstances, when it is clear that examples have been included in a statute for purposes of emphasis or in response to recent, high profile events, rather than to restrict the scope of coverage, both the United States Supreme Court and the lower federal courts have declined to apply canons, including ejusdem generis, to construe a statutory provision overly narrowly.[68] For similar reasons, we conclude that the ejusdem generis canon is not applicable to the predicate exception.

c

Statutory Exceptions To Be Construed Narrowly

Citing *Commissioner of Internal Revenue* v. *Clark*, 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989), the defendants' rely on another canon, contending that the predicate exception, like other statutory exceptions, must be construed narrowly to preserve the primary purpose of PLCAA. As we explained, however, our review of the statutory language strongly suggests that the defendants' have misperceived the primary purpose of PLCAA, which is not to shield firearms sellers from

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[68] See, e.g., *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226–27, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 44 n.5, 103 S.Ct. 2218, 76 L.Ed.2d 400 (1983); *Millsap* v. *Andrus*, 717 F.2d 1326, 1329 n.5 (10th Cir. 1983); *United States* v. *Kaluza*, Docket No. 12-265, 2013 WL 6490341, *21–23 (E.D. La. December 10, 2013), aff'd, 780 F.3d 647 (5th Cir. 2015).

liability for wrongful or illegal conduct. If Congress had intended to supersede state actions of this sort, it was required to make that purpose clear.[69]

2

Related Legislation

We also find it instructive that, in early 2005, at approximately the same time that the proposed legislation that ultimately became PLCAA was introduced, bills were introduced in both the House of Representatives and the Senate that would have bestowed PLCAA-type immunity on fast food restaurant companies to protect them from lawsuits seeking to hold them liable for consumers' obesity and related health problems.[70] Both bills contained language that was substantially similar to PLCAA's predicate exception: "A qualified civil liability action shall not include . . . an action based on allegations that . . . a manufacturer or seller of [food] knowingly violated a Federal or State statute applicable to the marketing, advertisement, or labeling of [food] with intent for a person to rely on that violation . . . ." S. 908, 109th Cong. § 4 (2005); accord H.R. 554, 109th Cong. § 4 (2005). The House Report accompanying H.R. 554 made clear that "applicable" statutes for purposes of that bill were not limited to laws, such as the Federal Food, Drug and Cosmetic Act; 21

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[69] We further observe that, during the legislative debates surrounding PLCAA, the author and various cosponsors of the proposed legislation repeatedly emphasized that it must be narrowly construed and that it protects only those firearms sellers who have not engaged in any illegal or irresponsible conduct. See, e.g., 151 Cong. Rec. 17,371 (2005), remarks of Senator Jefferson Beauregard Sessions III, *id.*, 18,044, remarks of Senator Craig; *id.*, 18,911, remarks of Senator Craig; *id.*, 19,137, remarks of Senator Craig; *id.*, 23,266, remarks of Representative Clifford Bundy Stearns.

[70] See S. 908, 109th Cong. (2005); H.R. 554, 109th Cong. (2005).

U.S.C. § 301 et seq. (2012); that directly and specifically regulate the food industry. Rather, the report indicated that state consumer protection laws, such as CUTPA, also qualified as predicate statutes, even though they are laws of general applicability that do not expressly address food and beverage marketing or labeling: "Every state has its own deceptive trade practices laws, and a knowing violation of any of such state laws could allow suits to go forward under the legislation if the criteria specified . . . are met."[71] H.R. Rep. No. 109-130, p. 8H.R. Rep. No. 109-130, p. 8 (2005).

We recognize that these bills never became law and also that food and firearms are different types of products that implicate different risks and concerns. Nevertheless, we cannot ignore the fact that PLCAA and the fast food bills were introduced at essentially the same time, with substantially similar language and structure.[72] See 2B N. Singer & J. Singer, Statutes and Statutory Construction (7th Ed. 2012) § 51:4, pp. 275–76 (vetoed bills and repealed statutes may be construed in pari materia to assist in interpreting ambiguous legislation). In light of this fact, there is good reason to believe that legislators would have understood the term "statute

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[71] See 1 N. Singer & J. Singer, Statutes and Statutory Construction (New Ed. 2010) § 11:14, p. 565 ("[committee] report is of great significance for purposes of statutory interpretation"); 2A N. Singer & S. Singer, supra, § 48:6, p. 585 ("courts generally view committee reports as the 'most persuasive indicia' of legislative intent"); 2A N. Singer & S. Singer, supra, § 48:6, pp. 588–89 (legislative intent clearly expressed in committee report trumps rules of textual construction, such as ejusdem generis).

[72] Notably, all but one of the thirty-two sponsors and cosponsors of S. 908 also cosponsored S. 397, 109th Cong. (2005), the bill that ultimately became PLCAA, and the sponsor of each bill cosponsored the other.

applicable to" in 15 U.S.C. § 7903 (5) (A) (iii) as similarly encompassing an action under CUTPA against a company that unethically markets firearms for illegal purposes.

3

The Legislative History of PLCAA

Finally, to the extent that any ambiguities remain unresolved, we consider the legislative history of PLCAA. Although the extensive history of the statute presents something of a mixed bag, our review persuades us that Congress did not intend to limit the scope of the predicate exception to violations of firearms specific laws or to confer immunity from all claims alleging that firearms sellers violated unfair trade practice laws.

During the legislative debates, opponents of the proposed legislation that became PLCAA repeatedly questioned why it was necessary to confer immunity on the firearms industry when, in their view, only a very small number of gun violence related lawsuits had been filed against firearms manufacturers and distributors, most of which had been dismissed at the trial court level.[73] In response, PLCAA's sponsor and several of PLCAA's cosponsors described the specific types of lawsuits that the legislation was intended to prohibit. See footnotes 74 and 76 of this opinion. They emphasized that their primary concern was not with lawsuits such as the present action, in which individual plaintiffs who have been harmed in a specific incident of gun violence seek to hold the sellers responsible for their specific misconduct in selling the weapons involved. See *id.* Many proponents indicated that their intent was to preclude

[73] See, e.g., 151 Cong. Rec. 18,099 (2005), remarks of Senator Christopher John Dodd.

the rising number of instances in which municipalities and "anti-gun activists" filed "junk" or "frivolous" lawsuits targeting the entire firearms industry.[74] As one cosponsor of the legislation explained, "[t]his bill is only intended to protect law-abiding members of the firearms industry from nuisance suits that have no basis in current law, that are only intended to regulate the industry or harass the industry or put it out of business . . . which are [not] appropriate purposes for a lawsuit."[75] 151 Cong. Rec. 18,104 (2005), remarks of Senator Max Sieben Baucus.[76] In the present action, by contrast, the private

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[74] 151 Cong. Rec. 18,058 (2005), remarks of Senator Coburn; *id.*, 18,084, 18,100, 19,135, remarks of Senator Craig; *id.*, 18,941– 42, remarks of Senator Richard John Santorum; *id.*, 19,118–19, remarks of Senator John Thune; *id.*, 19,119, remarks of Senator Jefferson Beauregard Sessions III; *id.*, 23,268, remarks of Representative Robert William Goodlatte; *id.*, 23,278, remarks of Representative John J. H. Schwarz; see also *Cincinnati* v. *Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 417, 768 N.E.2d 1136 (2002) (recognizing "[the] growing number of lawsuits brought by municipalities against gun manufacturers and their trade associations to recover damages associated with the costs of firearm violence incurred by the municipalities").

[75] The House report on a substantially similar bill introduced during the 107th Congress explained the need for the legislation as follows: "There are a number of legal theories under which plaintiffs are arguing [that] the firearms industry should be held responsible, including improper or defective distribution, unsafe design or product liability, and public nuisance. To date, every case that has been litigated to conclusion has been dismissed . . . ." H.R. Rep. No. 107-727, pt. 1, p. 4 (2002). Notably, wrongful marketing claims are not identified among the category of legal theories that Congress sought to preclude.

[76] The cosponsors further emphasized that plaintiffs in the cases of concern were seeking legislative type equitable remedies, such as purchase limits or restrictions on sales to small gun dealers. See, e.g., 151 Cong. Rec. 18,103 (2005), remarks of Senator Baucus; see also *id.*, 18,059, remarks of Senator Coburn.

victims of one specific incident of gun violence seek compensation from the producers and distributors of a single firearm on the basis of alleged misconduct in the specific marketing of that firearm. Few if any of the bill's sponsors indicated that cases of this sort were what PLCAA was intended to preclude.

In addition, during the course of the legislative debates, many legislators either expressly stated or clearly implied that the only actions that would be barred by PLCAA would be ones in which a defendant bore absolutely no responsibility or blame for a plaintiff's injuries and was, in essence, being held strictly liable for crimes committed with firearms that it had merely produced or distributed. See *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1159 (Berzon, J., concurring in part and dissenting in part). One cosponsor, for example, emphasized that "the heart of this bill" was that one can be held liable for violating a statute during the production, distribution, or sale of firearms, "[b]ut we are not going to extend it to a concept where you are responsible, *after you have done everything right*, for what somebody else may do who bought your product and they did it wrong and it is their fault, not yours." (Emphasis added.) 151 Cong. Rec. 18,920 (2005), remarks of Senator Lindsey O. Graham. Another cosponsor explained the essential evil to which the bill was directed: "It is out of that fear and concern that we have mayors and cities passing laws that create strict liability . . . [Firearms sellers have] become . . . insurer[s] against criminal activity by criminals." *Id.*, 18,924, remarks of Senator Jefferson Beauregard Sessions III. Senator Sessions added: "That is what we are trying to curtail here—this utilization of the legal system . . . ." *Id.*

A common theme running through supporters' statements was that holding a firearms seller liable for third-party gun violence for which the seller is wholly blameless is no different from holding producers of products such as automobiles, matches, baseball bats, and knives strictly liable when those ubiquitous but potentially dangerous items are inappropriately or illegally used to commit crimes. As the author of PLCAA, Senator Craig, explained: "If a gun manufacturer is held liable for the harm done by a criminal who misuses a gun, then there is nothing to stop the manufacturers of any product used in crimes from having to bear the costs resulting from the actions of those criminals. So as I mentioned earlier, automobile manufacturers will have to take the blame for the death of a bystander who gets in the way of the drunk driver. The local hardware store will have to be held responsible for a kitchen knife it sold, if later that knife is used in the commission of a rape. The baseball team whose bat was used to bludgeon a victim will have to pay the cost of the crime. The list goes on and on." *Id.*, 18,085. The implication of this argument is that legislators' primary concern was that liability should not be imposed in situations in which the producer or distributor of a consumer product bears absolutely no responsibility for the misuse of that product in the commission of a crime. There is no indication that the sponsors of PLCAA believed that sellers of those consumer products should be shielded from liability if, for example, an automobile manufacturer advertised that the safety features of its vehicles made them ideally suited for drunk driving, or if a sporting goods dealer ran advertisements encouraging high school baseball players to hurl their bats at the opposing pitcher in retaliation for an errant pitch. That

is, in essence, what the plaintiffs have alleged in the present case.

To the extent that supporters of PLCAA were concerned with lawsuits other than those seeking to hold firearms sellers strictly liable for gun violence, they consistently expressed that their intention was to foreclose novel legal theories that had been developed by anti-gun activists with the goal of putting firearms sellers out of business.[77] The author of the legislation explained as follows: "As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry. Well recognized causes of action are protected by the bill. Plaintiffs can still argue their cases for violations of law . . . . The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle." *Id.*, 18,096, remarks of Senator Craig. In addition, a number of lawmakers emphasized that the legislation was primarily directed at heading off unprecedented *tort* theories,[78] which explains why the predicate exception expressly preserved liability for statutory violations. See *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1135 ("Congress clearly intended to preempt common-law claims, such as general tort theories of liability"); *id.*, at 1160–61 (Berzon, J., concurring in part and dissenting in part) ("[PLCAA] was viewed essentially as a [tort reform]

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[77] See, e.g., 151 Cong. Rec. 17,370 (2005), remarks of Senator Sessions; *id.*, 18,942, remarks of Senator Richard John Santorum; *id.*, 19,119, 19,129, remarks of Senator Orrin Grant Hatch; *id.*, 19,120, remarks of Senator Craig;

[78] See, e.g., 151 Cong. Rec. 19,120 (2005), remarks of Senator Craig; *id.*, 23,267, remarks of Representative Mike Pence; *id.*, 23,273, remarks of Representative Frank James Sensenbrenner, Jr.

measure, aimed at restraining the supposed expansion of tort liability").

As we discussed previously, the plaintiffs' theory of liability is not novel; nor does it sound in tort.[79] The plaintiffs allege that the defendants' engaged in unfair trade practices in violation of CUTPA, a statute that was enacted in 1973. See P.A. 73-615. Furthermore, CUTPA, by its express terms, is modeled on the FTC Act; see General Statutes § 42-110b (b); which has been in effect for more than one century. See Act of September 26, 1914, Pub. L. No. 63-203, 38 Stat. 717. As we explained, the FTC Act and its state counterparts have long been used to regulate not only the sale and marketing of firearms but also claims that sellers of other dangerous products have advertised their wares in a manner that modeled or promoted unsafe behavior and created an

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[79] We note, however, that there also is ample precedent for recognizing wrongful marketing claims of this sort predicated on tort theories of liability. See, e.g., *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1112, 1114, 1122 (11th Cir. 1992) (affirming judgment for plaintiff under Georgia common law when defendants' published advertisement in which "mercenary" offered "[discreet] gun for hire," resulting in murder of plaintiffs' decedent), cert. denied, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993); *Merrill* v. *Navegar, Inc.*, supra, 26 Cal. 4th at 491 and n.9, 110 Cal. Rptr.2d 370, 28 P.3d 116 (leaving open possibility that California law recognizes cause of action for negligent advertising premised on immoral promotion of criminal use of firearms); *Bubalo* v. *Navegar, Inc.*, Docket No. 96 C 3664, 1997 WL 337218, *9 (N.D. Ill. June 13, 1997) (determining that Illinois law recognizes cause of action for negligent marketing of assault pistols for criminal purposes but holding that plaintiffs had failed to plead sufficient facts to establish causation), modified on other grounds, 1998 WL 142359 (N.D. Ill. March 20, 1998); *Moning* v. *Alfono*, 400 Mich. 425, 432, 254 N.W.2d 759 (1977) (question of whether marketing slingshots directly to children creates unreasonable risk of harm was for jury to resolve).

unreasonable risk that viewers would engage in unsafe or illegal conduct.[80]

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[80] We further observe that, during the legislative debates, supporters of the bill that became PLCAA frequently stated that more than one half of the states in the country already had adopted similar laws and that PLCAA was necessary primarily to establish uniform national standards and to ensure that frivolous actions were not filed in the minority of jurisdictions that had not enacted such protections. See, e.g., 151 Cong. Rec. 17,370 (2005), remarks of Senator Sessions; *id.*, 23,020, remarks of Representative Phil Gingrey; *id.*, 23,024, remarks of Representative Charles Foster Bass; *id.*, 23,265, remarks of Representative Frederick C. Boucher; see also *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1136 (noting "Congress' intention to create national uniformity" in enacting PLCAA). As the author of a virtually identical House bill explained, "[t]he bill we are considering today is designed to simply mirror these [s]tates and what they have done to provide a unified system of laws . . . ." 151 Cong. Rec. 23,266, remarks of Representative Clifford Bundy Stearns.

Notably, most of the state laws to which PLCAA was analogized, by their terms, bar only actions against firearms sellers brought by municipalities and other public entities. See H.R. Rep. No. 108-59, p. 16 (2003). Indeed, legislators recognized that "[m]any [states'] immunity statutes only limit the ability of cities, counties, and other local governments to sue [gun manufacturers and sellers]." *Id.* Moreover, of the state laws that provide broader immunity to firearms sellers, many govern only product liability actions; see, e.g., Idaho Code Ann. § 6-1410 (2004); N.C. Gen. Stat. § 99B-11 (2017); S.C. Code Ann. § 15-73-40 (2005); Tex. Civ. Prac. & Rem. Code Ann. § 82.006 (b) (West 2017); Wn. Rev. Code Ann. § 7.72.030 (1) (a) (West 2017); whereas others permit actions alleging the violation of any state law. See, e.g., Ohio Rev. Code Ann. § 2305.401 (B) (3) (West 2017); see also Mich. Comp. Laws Serv. § 28.435 (7) (LexisNexis 2015) ("[a] federally licensed firearms dealer is not liable for damages arising from the use or misuse of a firearm if the sale complies with this section, any other applicable law of this state, and applicable federal law"). Accordingly, very few of the state laws on which legislators purported to model PLCAA would even potentially bar the types of wrongful marketing claims at issue in the present action.

The defendants', purporting to rely on the decision of the Ninth Circuit in *Ileto*, argue that the legislative history of PLCAA supports a more restrictive view of the scope of the predicate exception. We read *Ileto* differently. As we noted; see footnote 47 of this opinion; the court in that case concluded that "congressional speakers' statements concerning the scope of . . . PLCAA reflected the understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm[s] regulations *or sales and marketing regulations*." (Emphasis added.) *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1137. Because CUTPA specifically regulates commercial sales and marketing activities such as those at issue in the present case; see, e.g., *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, 117 F. Supp.2d 167, 178 (D. Conn. 2000); it falls squarely within the predicate exception, as *Ileto* construed the legislative history.

We do not dispute that, over the course of the hundreds of pages of coverage of the legislative debates, a few congressional supporters of PLCAA made a few brief references to predicate statutes as being firearms specific.[81] What the defendants' have overlooked, however, are the dozens of statements by PLCAA's drafter and cosponsors that imply or directly state that the predicate exception applies far more broadly, such that firearms companies may be held liable for violation of *any* applicable law, and not only those laws that specifically govern the firearms trade. Indeed, in the vast majority of instances in which the predicate exception was discussed during the legislative debates,

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[81] See, e.g., 151 Cong. Rec. 18,085 (2005), remarks of Senator Craig; *id.*, 18,914, remarks of Senator Kathryn Ann Bailey Hutchison; *id.*, 18,942, remarks of Senator Richard John Santorum.

proponents spoke in broad, general terms, indicating that the bill would not immunize firearms companies that had engaged in *any* illegal activity.[82]

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[82] See, e.g., 151 Cong. Rec. 17,370–71 (2005), remarks of Senator Sessions ("Why would the manufacturer or seller of a gun who is not negligent, who obeys all of the applicable laws—we have a host of them—be held accountable . . . ? . . . I don't understand how . . . [a product that is] sold according to the laws of the United States [can create legal liability] for an intervening criminal act."); *id.*, 17,371, remarks of Senator Sessions ("Manufacturers and sellers are still responsible for their own negligent or criminal conduct and must operate entirely within the complex [s]tate and [f]ederal laws. . . . Plaintiffs can go to court if the gun dealers do not follow the law . . ."); *id.*, 17,377, remarks of Senator Sessions ("Under this bill, I think it is very important to note that you can sue gun sellers and manufacturers who violate the law. It is crystal clear in the statute that this is so."); *id.*, 17,390, remarks of Senator Orrin Grant Hatch ("This bill is not a license for the gun industry to act irresponsibly. If a manufacturer or seller does not operate *entirely* within [f]ederal or [s]tate law, it is not entitled to the protection of this legislation." [Emphasis added.]); *id.*, 18,059, remarks of Senator Coburn ("[m]anufacturers and sellers are still responsible for their own negligent or criminal conduct and must operate *entirely* within the [f]ederal and [s]tate laws" [emphasis added]); *id.*, 18,103, remarks of Senator Baucus (bill confers immunity on "[b]usinesses that comply with *all* applicable [f]ederal and [s]tate laws" [emphasis added]); *id.*, remarks of Senator Baucus ("This bill . . . will not shield the industry from its own wrongdoing or from its negligence . . . . For example, the bill will not require dismissal of a lawsuit if a member of the industry breaks the law . . ."); *id.*, 18,942, remarks of Senator Richard John Santorum (PLCAA is "narrowly crafted" law that continues to hold responsible "individuals and companies that knowingly violate the law"); *id.*, 19,118–19, remarks of Senator John Thune ("This bill . . . [protects] innocent . . . gun manufacturers and gun dealers . . . who have abided by the law . . . [but] allows suits against manufacturers . . . for violating a law in the production or sale of a firearm . . . . These are not arbitrary standards . . . . They are established legal principles that apply across the board to all industries."); *id.*, 23,020, remarks of Representative Phil Gingrey (exception applies to violations of "a [s]tate or [f]ederal statute

Several cosponsors of the bill that became PLCAA specifically explained that it would not preclude victims of gun violence from holding firearms companies accountable for injuries resulting from their gross negligence or reckless conduct, because, essentially, any such conduct would be in violation of some state or federal law. See, e.g., 151 Cong. Rec. 18,919 (2005), remarks of Senator Jon Llewellyn Kyl ("[M]ost of the acts that would meet the definition of gross negligence would already be in violation of law. And if they are in violation of law, they are not exempted from this legislation. We don't try to exempt any gun manufacturer for conduct [that] is in violation of law. So by definition that would be an exemption from the provisions of the bill . . . . The bottom line here is that if there really is a problem, that is to say, the conduct is so bad that it is a violation of law, no lawsuit is precluded under our bill in any way . . . . So in fact if the gross negligence or reckless conduct of a person was the proximate cause of death or injury—that is the allegation—you are in court irrespective of this bill . . . ."); *id.*, 18,922, remarks of Senator Orrin Grant Hatch

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applicable to sales or marketing"); *id.*, 23,265, remarks of Representative Frederick C. Boucher ("[t]he bill . . . does not affect suits against anyone who has violated other [s]tate or [f]ederal laws"); *id.*, 23,266, remarks of Representative Clifford Bundy Stearns ("[T]his legislation is very narrowly tailored to allow suits against any bad actors to proceed. It includes carefully crafted exceptions . . . for . . . criminal behavior by a gun maker or seller . . . ."); *id.*, 23,274, remarks of Representative Frank James Sensenbrenner, Jr. ("This is a carefully crafted bill. It provides immunity for people who have not done anything wrong . . . but it does allow lawsuits to proceed against the bad actors."); *id.*, remarks of Representative Steny Hamilton Hoyer (bill provides immunity "unless a manufacturer or seller of arms acts in some wrongful or criminal way").

("[v]irtually any act that would meet the definition of gross negligence . . . would already be a violation of [f]ederal, [s]tate or local law, and therefore would not receive the protection of this law anyway"). The clear implication of these comments is that the predicate exception extends beyond firearms specific laws and encompasses laws such as CUTPA, which prohibit wholly irresponsible conduct such as the wrongful advertising of potentially dangerous products for criminal or illegal purposes.

The strongest support for the defendants' reading of the legislative history is a passing statement by the author of PLCAA, Senator Craig, that "[t]his bill does not shield . . . [those who] have violated existing law . . . and I am referring to the [f]ederal firearms laws . . . ." *Id.*, 18,085. That statement was made, however, in the context of a discussion of the federal record keeping requirements that govern sales of firearms, requirements that are indisputably specific to that industry. At no point did Senator Craig suggest that, in his opinion, the only *state* laws that qualify as predicate statutes are those that specifically regulate the firearms industry. Rather, on numerous occasions during the legislative debates, Senator Craig categorically stated that the bill was intended to protect only law abiding firearms companies that had not violated *any* federal or state law.[83] "As we have stressed repeatedly," Senator Craig

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[83] See, e.g., 151 Cong. Rec. 2561 (2005) ("These lawsuits are based [on] the notion that even though a business complies with *all* laws and sells a legitimate product, it should be held responsible . . . . [PLCAA] specifically provides that actions based on the wrongful conduct of those involved in the business of manufacturing and selling firearms would not be affected by this legislation. The bill is solely directed to stopping abusive, politically driven litigation . . . ." [Emphasis added.]); *id.*, 18,057 ("[t]his bill gives specific examples of

emphasized, "this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry. Well recognized causes of action are protected by the bill. Plaintiffs can still argue their cases for violations of law . . . ."[84] *Id.*, 18,096. Accordingly, we conclude that the

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lawsuits not prohibited . . . lawsuits based on violations of [state] and [f]ederal law"); *id.*, 18,057–58 ("Any manufacturer, distributor, or dealer who knowingly violates *any* [s]tate or [f]ederal law can be held civilly liable under the bill. This bill does not shut the courthouse door . . . . Current cases [in which] a manufacturer, distributor, or dealer knowingly violates a [s]tate or [f]ederal law will not be thrown out." [Emphasis added.]); *id.*, 18,061 ("[This bill] does not protect firearms . . . manufacturers, sellers or trade associations from any lawsuits based on their own negligence or criminal conduct. The bill gives specific examples of lawsuits not prohibited. Let me repeat, not prohibited: Product liability . . . [n]egligence or negligent entrustment, breach of contract, lawsuits based on a violation of [s]tate and [f]ederal law, it is very straightforward, and we think it is very clear."); *id.*, 18,085 ("Finally, this bill does not protect any member of the gun industry from lawsuits for harm resulting from *any illegal actions* they have committed. Let me repeat it. If a gun dealer or manufacturer violates the law, this bill is not going to protect them . . . ." [Emphasis added.]); *id.*, 18,096 ("[i]f manufacturers or dealers break the law or commit negligence, they are still liable"); *id.*, 18,911 ("this legislation [has come] to the floor to limit the ability of junk or abusive kinds of lawsuits in a very narrow and defined way, but in no way—and I have said it very clearly—denying the recognition that if a gun dealer or a manufacturer acted in an illegal or irresponsible way . . . this bill would not preempt or in any way protect them"); *id.*, 19,136–37 ("[t]his bill will not prevent a single victim from obtaining relief for wrongs done to them by anyone in the gun industry"); *id.*, 19,137 ("This bill is intended to do one thing, and that is to end the abuse that is now going on in the court system of America against law-abiding American businesses when they violate *no* law . . . . But if that law-abiding citizen violates the law . . . then they are liable." [Emphasis added.]).

[84] Indeed, Senator Craig suggested during the legislative debates that a law as broadly applicable as a local zoning regulation could qualify as a predicate statute. See 151 Cong. Rec. 18,096 (2005).

legislative history of PLCAA does not support the defendants' contention that Congress intended to shield them from potential liability for the types of CUTPA violations that the plaintiffs have alleged.

## VI
## CONCLUSION

It is, of course, possible that Congress intended to broadly immunize firearms sellers from liability for the sort of egregious misconduct that the plaintiffs have alleged but failed to effectively express that intent in the language of PLCAA or during the legislative hearings. If that is the case, and in light of the difficulties that the federal courts have faced in attempting to distill a clear rule or guiding principle from the predicate exception, Congress may wish to revisit the issue and clarify its intentions.

We are confident, however, that, if there were credible allegations that a firearms seller had run explicit advertisements depicting and glorifying school shootings, and promoted its products in video games, such as "School Shooting," that glorify and reward such unlawful conduct,[85] and if a troubled young man who watched those advertisements and played those games were inspired thereby to commit a terrible crime like the ones involved in the Sandy Hook massacre, then even the most ardent sponsors of PLCAA would not have wanted to bar a consumer protection lawsuit seeking to hold the supplier accountable for the injuries wrought by such unscrupulous marketing practices. That is not this case,

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[85] As the amici Newtown Action Alliance and Connecticut Association of Public School Superintendents stated in their amicus brief, at the time of the Sandy Hook massacre, Lanza owned a computer game entitled "School Shooting," in which the player enters a school and shoots at students.

and yet the underlying legal principles are no different. Once we accept the premise that Congress did not intend to immunize firearms suppliers who engage in truly unethical and irresponsible marketing practices promoting criminal conduct, and given that statutes such as CUTPA are the only means available to address those types of wrongs, it falls to a jury to decide whether the promotional schemes alleged in the present case rise to the level of illegal trade practices and whether fault for the tragedy can be laid at their feet.

For the foregoing reasons, we conclude that the trial court properly determined that, although most of the plaintiffs' claims should have been dismissed, PLCAA does not bar the plaintiffs' wrongful marketing claims and that, at least to the extent that it prohibits the unethical advertising of dangerous products for illegal purposes, CUTPA qualifies as a predicate statute. Specifically, if the defendants' did indeed seek to expand the market for their assault weapons through advertising campaigns that encouraged consumers to use the weapons not for legal purposes such as self-defense, hunting, collecting, or target practice, but to launch offensive assaults against their perceived enemies, then we are aware of nothing in the text or legislative history of PLCAA to indicate that Congress intended to shield the defendants' from liability for the tragedy that resulted.

The judgment is reversed with respect to the trial court's ruling that the plaintiffs lack standing to bring a CUTPA claim and its conclusion that the plaintiffs' wrongful death claims predicated on the theory that any sale of military style assault weapons to the civilian market represents an unfair trade practice were not barred under the applicable statute of limitations, and

the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion McDONALD, MULLINS and KAHN, Js., concurred.

DISSENT

ROBINSON, J., with whom VERTEFEUILLE and ELGO, Js., join, dissenting in part.

In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (arms act), 15 U.S.C. § 7901 et seq., to preempt what it had deemed to be frivolous lawsuits against the firearms industry arising from the proliferation of gun related deaths resulting from criminal activity in cities and towns across the country. See 15 U.S.C. § 7901 (2012) (articulating findings and purposes underlying arms act).[1] That preemption is not,

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[1] Section 7901 of title 15 of the United States Code provides: "(a) Findings "Congress finds the following:

"(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

"(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

"(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

"(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act [26 U.S.C. § 5801 et seq.], and the Arms Export Control Act [22 U.S.C. § 2751 et seq.].

"(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture,

marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

"(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

"(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

"(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

"(b) Purposes

"The purposes of [the arms act] are as follows:

"(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal

however, unconditional, as there are six exceptions to the definition of "qualified civil liability action" set forth in 15 U.S.C. § 7903 (5)(A)[2] that narrow the category of cases

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or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

"(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

"(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

"(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

"(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

"(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

"(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution."

[2] Section 7903 (5) (A) of title 15 of the United States Code provides: "In general "The term 'qualified civil liability action' means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

"(i) an action brought against a transferor convicted under section 924 (h) of title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

"(ii) an action brought against a seller for negligent entrustment or negligence per se;

proscribed by the arms act. See 15 U.S.C. § 7902 (2012).[3] One such exception, for "an action in which a manufacturer or seller of a [firearm, ammunition, or

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"(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

"(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

"(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18;

"(iv) an action for breach of contract or warranty in connection with the purchase of the product;

"(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

"(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26."

[3] Section 7902 of title 15 of the United States Code provides: "(a) In general "A qualified civil liability action may not be brought in any Federal or State court.

"(b) Dismissal of pending actions

"A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending."

component part] knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought"; 15 U.S.C. § 7903 (5) (A) (iii) (2012); "has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute—so it is.'" "*Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009), cert. denied, 560 U.S. 924, 130 S.Ct. 3320, 176 L.Ed.2d 1219 (2010). In part V of its opinion, the majority concludes that the claims made by the plaintiffs[4] under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., which are founded on a theory that wrongful and unscrupulous advertising by the defendants',[5] who manufactured, distributed, and sold the Bushmaster AR-15 rifle, Model XM15-E2S, was a substantial factor in the criminal activity of the shooter at the Sandy Hook School on December 14, 2012, are not

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[4] The plaintiffs at issue in the present appeal are as follows: Donna L. Soto, administratrix of the estate of Victoria L. Soto; Ian Hockley and Nicole Hockley, coadministrators of the estate of Dylan C. Hockley; William D. Sherlach, executor of the estate of Mary Joy Sherlach; Leonard Pozner, administrator of the estate of Noah S. Pozner; Gilles J. Rousseau, administrator of the estate of Lauren G. Rousseau; David C. Wheeler, administrator of the estate of Benjamin A. Wheeler; Neil Heslin and Scarlett Lewis, coadministrators of the estate of Jesse McCord Lewis; Mark Barden and Jacqueline Barden, coadministrators of the estate of Daniel G. Barden; and Mary D'Avino, administratrix of the estate of Rachel M. D'Avino. See also footnote 2 of the majority opinion.

[5] The defendants' are as follows: Bushmaster Firearms International, LLC; Freedom Group, Inc.; Bushmaster Firearms; Bushmaster Firearms, Inc.; Bushmaster Holdings, LLC; Remington Arms Company, LLC; Remington Outdoor Company, Inc.; Camfour, Inc.; Camfour Holding, LLP; Riverview Sales, Inc.; and David LaGuercia.

preempted by the arms act because CUTPA is a predicate statute for purposes of the predicate exception. Having considered the text and legislative history of the arms act, I adopt a contrary answer to this national question of first impression, and conclude that the predicate exception encompasses only those statutes that govern the sale and marketing of firearms and ammunition specifically, as opposed to generalized unfair trade practices statutes that, like CUTPA, govern a broad array of commercial activities. Because the distastefulness of a federal law does not diminish its preemptive effect, I would affirm the judgment of the trial court striking the plaintiff's complaint in its entirety. Accordingly, I respectfully dissent from part V of the majority opinion.

I begin by noting my agreement with the facts, procedural history, and plenary standard of review as stated by the majority. See, e.g., *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 447, 102 A.3d 32 (2014) ("[w]hether state causes of action are preempted by federal statutes and regulations is a question of law over which our review is plenary"). I also assume, without deciding, that the majority properly concludes in part IV D of its opinion that, "at least with respect to wrongful advertising claims, personal injuries alleged to have resulted directly from such advertisements are cognizable under CUTPA." Accordingly, I now turn to the pivotal question of whether the predicate exception saves such claims under CUTPA from preemption by the arms act.

I

GENERAL PRINCIPLES OF PREEMPTION AND STATUTORY CONSTRUCTION

I recognize that the supremacy clause of the United States constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. "As a consequence, state and local laws are preempted [when] they conflict with the dictates of federal law, and must yield to those dictates. . . . Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. . . .

"[When] a federal statute expressly preempts state or local law, analysis of the scope of the [preemption] statute must begin with its text. . . . And, we must also start with the assumption that the historic police powers of the [s]tates [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress. . . . As such, Congress' purpose is the ultimate touchstone of preemption analysis." (Citation omitted; internal quotation marks omitted.) *Modzelewski's Towing & Recovery, Inc.* v. *Commissioner of Motor Vehicles*, 322 Conn. 20, 28–29, 139 A.3d 594 (2016), cert. denied, --- U.S. ---, 137 S.Ct. 1396, 197 L.Ed.2d 554 (2017).

In determining whether Congress intended the arms act to preempt the CUTPA claims in the present case, I turn to the principles that govern our "construction and application of federal statutes," under which "principles of comity and consistency require us to follow the plain meaning rule . . . . Moreover, it is well settled that the decisions of [t]he [United States Court of Appeals for

the] Second Circuit . . . carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts." (Internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 140, 172 A.3d 1228 (2017); see also, e.g., *Modzelewski's Towing & Recovery, Inc.* v. *Commissioner of Motor Vehicles*, supra, 322 Conn. at 32, 139 A.3d 594.

"Accordingly, our analysis of the federal statutes in the present case begins with the plain meaning of the statute. . . . If the text of a statute is ambiguous, then we must construct an interpretation consistent with the primary purpose of the statute as a whole. . . . Under the plain meaning rule, [l]egislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous. . . . Thus, our interpretive process will begin by inquiring whether the plain language of [each] statute, when given its ordinary, common meaning . . . is ambiguous." (Citations omitted; internal quotation marks omitted.) *Szewczyk* v. *Dept. of Social Services*, 275 Conn. 464, 476, 881 A.2d 259 (2005). "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 634, 148 A.3d 1052 (2016); see also, e.g., *United States* v. *Peterson*, 394 F.3d 98, 105 (2d Cir. 2005); *United States* v. *Dauray*, 215 F.3d 257, 262 (2d Cir. 2000).

If a federal statute is ambiguous, the federal courts do not consider all extratextual sources to be of equal value in resolving that ambiguity. Instead, the Second Circuit first "turn[s] to canons of statutory construction for assistance in interpreting the statute. . . . [That court] resort[s] to legislative history only if, after

consulting canons of statutory instruction, the meaning remains ambiguous." (Citation omitted; internal quotation marks omitted.) *United States* v. *Rowland*, 826 F.3d 100, 108 (2d Cir. 2016), cert. denied, --- U.S. ---, 137 S.Ct. 1330, 197 L.Ed. 2d 517 (2017).

Accordingly, I begin with a review of the text of the relevant provisions of the arms act. The preemption provision provides that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902(a) (2012); see also 15 U.S.C. § 7902 (b) (2012) ("[a] qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending"). The arms act defines a "qualified civil liability action" in relevant part as "a civil action or proceeding . . . brought by any person against a manufacturer or seller of a qualified product,[6] or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . ." (Footnote added.) 15 U.S.C. § 7903 (5) (A) (2012). The arms act then provides six exceptions to the definition of qualified civil liability action; see footnote 2 of this dissenting opinion; including the predicate exception, which is defined as "an action in which a manufacturer or seller of a qualified product knowingly violated a State or

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[6] It is not disputed that the AR-15 is a "qualified product" under the arms act. See15 U.S.C. § 7903 (4) (2012) (defining "'qualified product'" as "firearm . . . ammunition . . . or component part . . . that has been shipped or transported in interstate or foreign commerce"). For the sake of convenience and clarity, I use the word "firearm" in describing the reach of the arms act, understanding that word to be synonymous with the definition of "qualified product" under 15 U.S.C. § 7903 (4).

Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

"(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or "(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18 . . . ." 15 U.S.C. § 7903 (5) (A) (iii) (2012).

Resolving whether CUTPA is a state statute "applicable to the sale or marketing of [firearms]"; 15 U.S.C. § 7903(5) (A) (iii) (2012); begins with the plain meaning of the word "applicable," which Congress did not define within the arms act. "In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 49, 161 A.3d 537 (2017). Merriam Webster's Collegiate Dictionary defines "applicable" as "capable of or suitable for being

applied: appropriate." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003), p. 60; see *id.*, p. 61 (defining "appropriate" as "especially suitable or compatible"). Considering this definition, I agree with the plaintiffs' argument that CUTPA reasonably could be deemed "applicable" to the "sale or marketing of [firearms]"; 15 U.S.C. § 7903 (5) (A) (iii) (2012); insofar as it is a broad statute that is "capable of" being applied to that—and nearly every other—business. The reasonableness of this reading is bolstered by Congress' use of the word "including" to set off its list of example predicate statutes, insofar as "the word 'including' may be used either as a word of enlargement or of limitation." *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 700 n.11, 784 A.2d 354 (2001); see also, e.g., *State* v. *DeFrancesco*, 235 Conn. 426, 435, 668A.2d 348 (1995) ("'[t]here is some ambiguity concerning whether the word "including" . . . was intended as a word of limitation . . . or one of enlargement'"); accord *Samantar* v. *Yousuf*, 560 U.S. 305, 317, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010) (stating that "use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive," but noting that "'[a] word may be known by the company it keeps'"); but see *Mahoney* v. *Lensink*, 213 Conn. 548, 569, 569 A.2d 518 (1990) (suggesting that phrase "shall include" is limiting, but use of word "include" or "including" omitting word "shall" is intended to be broader, with "the listed rights . . . a vehicle for enlargement rather than limitation," given purpose of statutory patients' bill of rights).

The defendants' reading of the predicate exception is, however, equally reasonable, particularly given the more technical definition of "applicable" in Black's Law Dictionary as it relates to laws or regulations. See Black's Law Dictionary (10th Ed. 2014) (defining

"applicable" in references to "a rule, regulation, law, etc.," as "affecting or relating to a particular person, group, or situation; having direct relevance"). The principle of noscitur a sociis, namely, that the "meaning of a statutory word may be indicated, controlled or made clear by the words with which it is associated in the statute"; (internal quotation marks omitted) *State* v. *Agron*, supra, 323 Conn. at 635–36, 148 A.3d 1052; allows us to view the example predicates, which describe statutes specifically applicable to the firearms trade, as cabining the more expansive reading of the word "applicable." See also, e.g., *Bilski* v. *Kappos*, 561 U.S. 593, 604, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010). Consistent with the two United States Courts of Appeal that have considered the meaning of the predicate exception; see *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1133–34; *New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008), cert. denied, 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009); I conclude that there is more than one reasonable reading of the predicate exception, rendering it ambiguous. I turn, therefore, to extratextual evidence, namely, the canons of statutory construction and, if necessary, the legislative history, to answer the question of whether CUTPA constitutes a predicate statute for purposes of 15 U.S.C. § 7903 (5) (A) (iii).

## II
## REVIEW OF FEDERAL CIRCUIT COURT PRECEDENT

In determining whether CUTPA is a predicate statute under the arms act, I do not write on a blank slate. Two of the United States Circuit Courts of Appeal, including the Second Circuit that we ordinarily find especially persuasive in deciding questions of federal law;

see, e.g., *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, supra, 327 Conn. at 140, 172 A.3d 1228; have considered whether state statutes of general applicability may be predicate statutes.

In *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 389–91, the city of New York claimed that the defendants', certain firearms manufacturers and distributors, "market[ed] guns to legitimate buyers with the knowledge that those guns [would] be diverted through various mechanisms into illegal markets" and sought injunctive relief requiring those defendants'" to take assorted measures that would effectively inhibit the flow of firearms into illegal markets." The Second Circuit considered whether a state criminal public nuisance statute; see N.Y. Penal Law § 240.45 (McKinney 2008);[7] constituted a predicate statute that would allow the city's claim to avoid preemption under the arms act. *New York* v. *Beretta U.S.A. Corp.*, supra, at 399; see also *id.* ("[i]t is not disputed that [the criminal nuisance statute] is a statute of general applicability that has never been applied to firearms suppliers for conduct like that complained of by the [c]ity"). The city argued that the predicate exception saved its action "because [the criminal nuisance statute] is a statute 'applicable to the sale or marketing of [firearms].' The [defendants']

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[7] Section 240.45 of New York's Penal Law (McKinney 2008) provided in relevant part: "A person is guilty of criminal nuisance in the second degree when:

"1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or

"2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct . . . ."

disagree[d], arguing that the predicate exception was intended to include statutes that specifically and expressly regulate the firearms industry." *Id.*

After engaging in a contextual analysis of the predicate exception and, in particular, the meaning of the term "applicable," the Second Circuit concluded that the predicate exception "does not encompass" the criminal nuisance statute, but "does encompass statutes [1] that expressly regulate firearms, or [2] that courts have applied to the sale and marketing of firearms; and . . . [3] that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *Id.*, at 404. In reaching that conclusion, the court stated that it found "nothing in the [arms act] that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception" and declined "to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the [c]ity complains of, in which case such a statute might qualify as a predicate statute." *Id.*, at 399–400. Accordingly, the court concluded that "while the mere absence in [the criminal nuisance statute] of any express reference to firearms does not, in and of itself, preclude that statute's eligibility to serve as a predicate statute under the [arms act, the criminal nuisance statute] is a statute of general applicability that does not encompass the conduct of firearms manufacturers of which the [c]ity complains. It therefore does not fall within the predicate exception to the claim restricting provisions of the [arms act]." *Id.*, at 400.

My review of the relevant statutory text and legislative history reveal no support for the Second Circuit's expansive holding that the predicate exception

includes statutes "that courts have applied to the sale and marketing of firearms" and "that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *Id.*, at 404. This ultimate conclusion is simply inconsistent with the court's more detailed analysis of the relevant statutory text and legislative history, which suggests a narrower reading of that exception. Specifically, the court considered the statements of purpose, as well as the list of example predicate statutes set forth in 15 U.S.C. § 7903 (5) (A) (iii) (I) and (II), which are "said to include statutes regulating [record keeping] and those prohibiting participation in direct illegal sales," and stated that "construing the term 'applicable to' to mean statutes that clearly can be said to regulate the firearms industry more accurately reflects the intent of Congress." *Id.*, at 402. The court also rejected the dictionary definition of "applicable" as "lead[ing] to a far [too] broad reading of the predicate exception" that "would allow the predicate exception to swallow the statute . . . ." *Id.*, at 403. Finally, the court cited the legislative history of the arms act as "support [for] the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry, in light of the statements' consistency amongst each other and with the general language of the statute itself." *Id.*, at 404.

Indeed, Judge Robert Katzmann authored a dissenting opinion aptly criticizing the majority's analysis as inconsistent with the plain language of the statute, particularly with respect to recognizing those statutes that courts had previously applied to the sale and manufacture of firearms, and further observed that the majority had provided no guidance with respect to when a statute of general applicability could, in fact, be deemed applicable to firearms, rendering that aspect of the

majority opinion entirely unpersuasive.[8] See *id.*, at 406. Accordingly, I decline to follow the analysis of the Second Circuit's ultimately unpersuasive decision, particularly given that any concerns regarding different outcomes in federal court; see *Turner* v. *Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000) (declining to follow Second Circuit precedent would create "bizarre result" when federal district court, located "only a few blocks away," would be bound under same facts); as a result of such a departure would be minimized because that case did not specifically involve a claim raised under a state unfair trade practices law.[9]

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[8] Judge Katzmann also observed that this approach creates a "Catch-22," insofar as "the apparently insurmountable obstacle for the plaintiffs here is that the New York courts have not yet addressed the question—as such, the majority feels free to conclude that [the criminal nuisance statute] is not 'applicable' to the sale and marketing of firearms. Unlike, say, a fruit, which is edible long before someone has eaten it, or gasoline, which is flammable even before someone has ignited it, the majority finds that a state law is not applicable until a state court actually applies it." *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 406–407. Judge Katzmann criticized this as inconsistent with the plain meaning of the word "applicable," and observed that it invited forum shopping in order for parties first to obtain a state court interpretation of the potentially applicable state law. *Id.*, at 407. Instead, Judge Katzmann would follow what he deemed to be the "plain meaning" of the predicate exception, concluding that [the] criminal nuisance statute could be applied to firearms by its general terms, and he would have certified to the New York Court of Appeals a question of state law, namely, "whether the . . . criminal nuisance statute . . . is in fact 'applicable to the sale and marketing of firearms.'" (Citation omitted.) *Id.* Although I disagree with Judge Katzmann's ultimate conclusion with respect to the plain meaning of the relevant statutory language, I nevertheless share his other concerns with respect to the interpretation of the predicate exception.

[9] I also find unpersuasive the decision of the Indiana Court of Appeals in *Smith & Wesson Corp.* v. *Gary*, 875 N.E.2d 422, 431 (Ind.

Although it too is not directly on point, my review of the predicate exception's text and legislative history indicates that the analysis of the United States Court of Appeals for the Ninth Circuit in *Ileto* v. *Glock, Inc.*, supra, 565 F.3d 1126, is more instructive.[10] In *Ileto*, the Ninth Circuit considered whether the predicate exception saved the plaintiff's claims of "knowing violations" of negligence, nuisance, and public nuisance under "California's general tort law [that] is codified in its civil code." *Id.*, at 1132–33. Observing "that the term 'applicable' has a spectrum of meanings, including the two poles identified by the parties," the Ninth Circuit considered the context of Congress' use of the word "applicable," as well as "the broader context of the statute as a whole." (Internal quotation marks omitted.) *Id.*, at 1134. The court stated that the "illustrative predicate statutes pertain specifically to sales and manufacturing activities, and most also target the firearms industry specifically. Those examples suggest that [the] [p]laintiffs' proposed all-encompassing meaning of the term 'applicable' is incorrect, because

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App. 2007), transfer denied, 915 N.E.2d 978 (Ind. 2009), to the extent that it concluded that the plain language of the predicate exception did not bar a city's claim of public nuisance against a gun manufacturer insofar as the nuisance statute is "capable of being applied" to the sale and marketing of firearms. I note, however, that the court emphasized that the allegations in the complaint satisfied the manufacturers' more restrictive reading of the predicate exception, because they claimed numerous violations of "statute[s] directly applicable to the sale or marketing of a firearm . . . ." *Id.*, at 432.

[10] I note that the plaintiffs in the present case have candidly acknowledged that the approach adopted by the Ninth Circuit in *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1126, is "more restrictive" than the Second Circuit's approach in *New York* v. *Beretta U.S.A. Corp.*, supra, 524 F.3d at 404.

each of the examples has—at the very least—a direct connection with sales or manufacturing. Indeed, if *any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute, there would be no need to list examples at all. Similarly, the examples suggest that [the] [d]efendants' asserted narrow meaning is incorrect, because some of the examples do not pertain exclusively to the firearms industry." (Emphasis in original.) *Id.*

Determining that the "text of the statute alone is inconclusive as to Congress' intent," the court then considered "the additional indicators of congressional intent." *Id.*, at 1135. In particular, the court observed that the express purpose of the arms act is to "'prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.'" *Id.*, quoting 15 U.S.C. § 7901 (b) (1) (2006). The court determined that, in "view of [the] congressional findings and that statement of purpose, Congress clearly intended to preempt common-law claims, such as general tort theories of liability. [The] [p]laintiffs' claims—'classic negligence and nuisance'—[are] general tort theories of liability that traditionally have been embodied in the common law." (Citation omitted; footnote omitted.) *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1135. The court emphasized that the California legislature did not intend to supplant the common law by enacting its civil code, but rather "to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution. . . . In other words,

although California has codified its common law, the evolution of those statutes is nevertheless subject to the same judicial evolution as ordinary common-law claims in jurisdictions that have not codified common law. That judicial evolution was precisely the target of the [arms act]." (Citation omitted; internal quotation marks omitted.) *Id.*, at 1136. The Ninth Circuit deemed it "more likely that Congress had in mind only these types of statutes—statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry—rather than general tort theories that happened to have been codified by a given jurisdiction." *Id.*

The Ninth Circuit then examined the "extensive" legislative history, and made "two general observations . . . . First, all of the congressional speakers' statements concerning the scope of the [arms act] reflected the understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations." *Id.*, at 1136–37. Second, the court observed that the "very case" before it was exactly "the type of case they meant the [arms act] to preempt," along with other "novel" cases. (Emphasis omitted.) *Id.*, at 1137. Ultimately, the court held that "Congress intended to preempt general tort law claims . . . even though California has codified those claims in its civil code."[11]

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[11] The decision of the Ninth Circuit in *Ileto* was not unanimous. In dissent, Judge Marsha S. Berzon concluded that the plaintiffs' claims alleging violations of the California Civil Code were, in fact, saved by the predicate exception. See *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1146–47. Judge Berzon first observed that "the predicate exception cannot possibly encompass *every* statute that might be 'capable of being applied' to the sale or manufacture of firearms; if it did, the exception would swallow the rule, and no civil lawsuits would ever be

*Id.*, at 1138. Unlike the Second Circuit, however, the Ninth Circuit expressly demurred to state "any view on the scope of the predicate exception with respect to any other statute." *Id.*, at 1138 n.9; see also *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 170–72 (D.C. 2008) (concluding that District of Columbia's Assault Weapons Manufacturing Strict Liability Act, D.C. Code § 7-2551.01 et seq. [2001], is not predicate statute because it is pure strict liability, and does not provide "a prohibition against, or standards of, conduct that are being violated," with plaintiffs' claims preempted because they did not allege that "defendants' knowingly violated any proscriptions or requirements of local or

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subject to dismissal under the [arms act]. I therefore agree with the majority that a limiting principle must be found, and that rather than trying to locate it in the word 'applicable' itself, we must look to the predicate exception's surrounding words." (Emphasis in original.) *Id.*, at 1155. Judge Berzon determined that "the key to interpreting the predicate exception is [Congress'] use of the word 'knowingly'"; *id.*; insofar as "[a]pplying the [arms act's] predicate exception as written—that is, as applying to all statutes capable of being applied to the sale or marketing of firearms, but imposing an actual knowledge requirement—would prohibit a swath of lawsuits against firearms manufacturers and sellers, including those brought by municipalities for violations of no-fault or absolute liability statutes or those brought by individuals alleging vicarious liability under state tort law for the conduct of third parties of which the gun manufacturers or sellers were not aware." *Id.*, at 1163. Judge Berzon concluded that the various allegations in the plaintiffs' complaint supported their claim that the defendants' "knowingly committed a range of acts in violation of California negligence and nuisance law" by engaging in sales and marketing practices that created "distribution channels that they *know* regularly provide guns to criminals and underage end users [and, despite information from government crime trace reports,] *knowingly* supply a range of disreputable distributors, dealers, gun shops, pawnshops, gun shows, and telemarketers in the [s]tate of California . . . ." (Emphasis in original; internal quotation marks omitted.) *Id.*, at 1156.

federal law governing the sale or possession of firearms"), cert. denied sub nom. *Lawson* v. *Beretta U.S.A. Corp.*, 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009).

With this case law in mind, I now turn to the canons of statutory interpretation and legislative history to determine whether the predicate exception encompasses unfair trade practices statutes that, like CUTPA, are not specific to the firearms industry.

## III
## CANONS OF CONSTRUCTION

With respect to the canons of statutory construction, I first observe that the predicate exception is exactly that—an *exception* to the arms act. It is well settled that, "when a statute sets forth exceptions to a general rule, we generally construe the exceptions narrowly in order to preserve the primary operation of the [provision]." (Internal quotation marks omitted.) *Capitol Records, LLC* v. *Vimeo, LLC*, 826 F.3d 78, 90–91 (2d Cir. 2016), cert. denied, --- U.S. ---, 137 S.Ct. 1374, 197 L.Ed.2d 554 (2017). This "proposition . . . is supported by common-sense logic. When a statute sets forth a general principle, coupled with an exception to it, it is logical to assume, in the face of ambiguity in the exception, that the legislature did not intend the exception to be so broad as to leave nothing of the general principle." *Id.*, at 91; see also *Commissioner of Internal Revenue* v. *Clark*, 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989) ("[g]iven that Congress has enacted a general rule that treats boot as capital gain, we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception"); *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1945) ("[t]o extend an exemption to other than those

plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people"). In the absence of clear direction from Congress to construe the predicate exception differently, I disagree with the majority's suggestion that we should read the arms act narrowly and its predicate exception more broadly.[12] See *Reves* v.

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[12] The majority states that Congress intended that the arms act itself be narrowly construed, insofar as its proponents described it as a "'narrow'" exemption intended only to curb "'junk or abusive'" lawsuits seeking to charge the firearms industry liable for the acts of third parties who are beyond their control. See, e.g., 151 Cong. Rec. 18,084, 18,911, 19,137 (2005), remarks of Senator Larry Edwin Craig. I disagree with the majority that this generalized legislative history indicates any desire by Congress to depart from the usual rules of statutory construction. Indeed, in arguing in support of the arms act, Representative Cliff Stearns, its sponsor in the House of Representatives, suggested that it would "eliminate predatory lawsuits that would otherwise cripple an entire industry," and described numerous pending cases against manufacturers and dealers arising from criminal shootings, based on theories such as public nuisance and strict liability statutes; he emphasized that he "made these remarks to ensure that anyone trying to evade the letter and spirit of this legislation will have as little 'wiggle room' as possible." *Id.*, 23,279–80.

I also note that frivolity remains in the eye of the beholder, and that the proponents of the arms act appear from their remarks, discussed in greater detail in part IV of this dissenting opinion, to employ that term in a manner different than its well established legal meaning. See, e.g., *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 254–55, 828 A.2d 64 (2003) ("an action is frivolous . . . if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law" [emphasis omitted; internal quotation marks omitted]); cf. *Mareno* v. *Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990) (discussing rule 11 of Federal Rules of Civil Procedure), cert. denied,

*Ernst & Young*, 507 U.S. 170, 183–84, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) ("'[L]iberal construction'" clause in Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. § 1961 et seq. [1988], which "obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute . . . is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause only serves as an aid for resolving an ambiguity; it is not to be used to beget one." [Internal quotation marks omitted.]).

Beyond the narrow construction that we should afford the exceptions to the arms act, the related doctrines of noscitur a sociis and avoiding legislative superfluity also inform the meaning of the phrase "State or Federal statute applicable to the sale or marketing of [firearms]"; 15 U.S.C. § 7903 (5) (A) (iii) (2012); and suggest that the examples of federal laws provided therein indicate the type of statutory violations that would sustain invocation of the predicate exception. Under the canon of noscitur a sociis, "an ambiguous term may be given more precise content by the neighboring words with which it is associated."[13] (Internal quotation marks omitted.) *Bilski* v. *Kappos*, supra, 561 U.S. at 604, 130 S.Ct. 3218; see also *Yates* v. *United States*, --- U.S. ---, 135 S.Ct. 1074, 1085,

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L.Ed.2d 673 (1991). Accordingly, I emphasize that I do not view the plaintiffs' claims in the present case as frivolous in any way.

[13] I note that a related canon often applied is "ejusdem generis, or the principle that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." (Internal quotation marks omitted.) *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 223, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008).

191 L.Ed.2d 64 (2015) ("we rely on the principle of noscitur a sociis—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the [a]cts of Congress" [internal quotation marks omitted]). "By using this interpretive aid, the meaning of a statutory word may be indicated, controlled or made clear by the words with which it is associated in the statute." (Internal quotation marks omitted.) *State* v. *Agron*, supra, 323 Conn. at 636, 148 A.3d 1052. "As a result, broader terms, when used together with more narrow terms, may have a more restricted meaning than if they stand alone." *Dattco, Inc.* v. *Commissioner of Transportation*, 324 Conn. 39, 48, 151 A.3d 823 (2016). This is particularly so, given this canon's relationship to the doctrine that "the [c]ourt will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 574, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995); accord *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("[b]ecause [e]very word and phrase [of a statute] is presumed to have meaning [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant" [internal quotation marks omitted]).

The very specific examples of firearms laws that Congress provides in the predicate exception strongly suggest that it intended only those statutes that are specific to the firearms trade to be considered "applicable to the sale or marketing of the product . . . ." 15 U.S.C. § 7903 (5) (A) (iii) (2012). The first example is "any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted,

or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product . . . ." 15 U.S.C. § 7903 (5) (A) (iii) (I) (2012). The second is "any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18 . . . ." 15 U.S.C. § 7903(5) (A) (iii) (II) (2012). Had Congress intended the predicate exception to broadly encompass any statute capable of application to the manufacture or sale of anything, the inclusion of those firearms-specific examples would be superfluous.[14] See

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[14] The majority relies on portions of the legislative history as indicating that "the record keeping and unlawful buyer illustrations were included in the final version of [the arms act] not in an effort to define, clarify, or narrow the universe of laws that qualify as predicate statutes but, rather, simply to stave off the politically potent attack that [the arms act] would have barred lawsuits like the one that had arisen from the widely reported beltway sniper attacks. There is no other plausible explanation for why Congress chose to modify the predicate exception language contained in the 2001 and 2003 bills, which otherwise was 'virtually identical' to the language in [the arms act]. 151 Cong. Rec. 2561 (2005), remarks of Senator Larry Edwin Craig; see also *id.*, 18,096, remarks of Senator Craig (indicating that bill is same for all intents and purposes as version introduced during 108th Congress, with addition of clarifying examples)." The majority further notes that this "conclusion is bolstered by the fact that Congress was fully aware that there are many types of federal statutes and regulations, filling 'hundreds of pages,' that specifically govern the firearms industry. 151 Cong. Rec. 18,059 (2005), remarks of Senator Thomas Allen Coburn." I respectfully disagree with this reading of the legislative history with respect to the import of the illustrative statutes in the predicate exception. Although I agree that the vitality of the beltway sniper

*Yates* v. *United States*, supra, 135 S.Ct. at 1087 ("Had Congress intended 'tangible object' in [18 U.S.C.] § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."); *Gustafson* v. *Alloyd Co.*, supra, 513 U.S. at 574–75, 115 S.Ct. 1061 (interpreting Securities Act of 1933 and stating that "[i]f 'communication' included every written communication, it would render 'notice, circular, advertisement, [and] letter' redundant, since each of these are forms of written communication as well"); *Dattco, Inc.* v. *Commissioner of Transportation*, supra, 324 Conn. at 48–49, 151 A.3d 823 ("The legislature's grouping [in General Statutes (Rev. to 2015) § 13b-36 (a)] of the term 'facilities' with other nouns that all denote tangible objects favors a conclusion that the term 'facilities' also refers to tangible objects other than land, buildings, and equipment that might be used in a transportation system. Moreover, interpreting 'facilities' to mean only tangible items does not render it superfluous or redundant with respect to the terms 'land,' 'buildings,' or 'equipment,' as the commissioner suggests. The term 'facilities' embraces numerous tangible items—other than land, buildings, or

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lawsuit was a powerful political consideration during the enactment of the arms act, I view that action's basis in concrete record keeping and unlawful buyer violations simply as an exemplar of what Congress did not intend the arms act to preclude. With those exemplars included in the final version of the predicate exception, I am not at liberty simply to ignore their import in the construction of the statute as a whole. See, e.g., *United States* v. *Dauray*, supra, 215 F.3d at 264 ("our role as a court is to apply the provision as written, not as we would write it" [internal quotation marks omitted]).

equipment—including bridges . . . docks . . . side railroad tracks that are part of a rail system . . . dams and reservoirs . . . and even horses." [Citations omitted.]). Although a reading of the predicate exception that is informed by the canons of construction strongly favors the defendants', the plaintiffs' proffered reading of the statute remains reasonable, insofar as "we do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008). Accordingly, I continue to consider the legislative history of the arms act in determining whether a predicate statute must specifically relate to the firearms industry.

## IV
## LEGISLATIVE HISTORY

The legislative history also supports a narrow reading of the predicate exception as limited only to those statutes that govern the sale and marketing of firearms specifically. I agree with the majority's description of the legislative history of the arms act as "extensive" and "present[ing] something of a mixed bag."[15] I disagree, however, with the majority's conclusion that the legislative history demonstrates that "Congress did not

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[15] As a general matter, I also agree with the observation of Judge Marsha S. Berzon, in her dissenting opinion in *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1126, that much of the legislative history of the arms act needs to be taken with a grain of salt. Judge Berzon aptly observed that "individual legislators at times suggested divergent views of what sorts of lawsuits the [arms act] would affect if it were passed into law. Some of those views appear perhaps implausibly narrow or implausibly broad, likely because the bill excited strong emotions from both its supporters and its opponents. As courts have long cautioned, however, the statements of single lawmakers do not establish congressional intent." (Footnote omitted.) *Id.*, at 1161–62.

intend to limit the scope of the predicate exception to violations of firearms specific laws or to confer immunity from all claims alleging that firearms sellers violated unfair trade practice laws." Consistent with the purpose of the arms act as set forth in 15 U.S.C. § 7901; see footnote 1 of this dissenting opinion; much of the legislative history consists of broad statements by supporters of the arms act about saving the American firearms industry from "predatory," "abusive," and "frivolous" lawsuits, sanctioned by "sympathetic activist judges," seeking "damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party."[16] 151 Cong. Rec. 18,057–58 (2005), remarks of

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[16] In contrast, opponents of the arms act roundly criticized it as a gift to the gun lobby that would deprive injured persons of the opportunity to hold the firearms industry responsible for turning a blind eye to criminal activity in the name of profits. See, e.g., 151 Cong. Rec. 18,065 (2005), remarks of Senator Dianne Feinstein ("[The arms act] has nothing to do with protecting lawful commerce; rather, it protects one segment of industry against the lawful interests of our [s]tates in remedying and deterring negligent conduct. . . . Its proponents argue that lawsuits need to be stopped in order to defend their view of the [s]econd [a]mendment. But that is pretense. This bill is a simple giveaway to one industry—the gun lobby. It is a special interest windfall."); *id.*, 18,902, remarks of Senator Edward Moore Kennedy ("Instead of addressing the real issues that can make our country and our communities safer, we are considering a bill that will close the courthouse door to victims of gun crimes and give a free pass to the handful of gun dealers and gun manufacturers who sell firearms to terrorists and criminals. We are doing it to appease the special interests of the [National Rifle Association]."); *id.*, 23,021, remarks of Representative James P. McGovern ("While the proponents of this bill claim that the intent of this legislation is to protect jobs at mom-and-pop gun stores from reckless lawsuits, the truth is that the bill is all about protecting profits for the gun industry. Ensuring its yearly profits, not protecting jobs nor safeguarding gun sales, is atop the priorities of the gun industry."); *id.*, 19,217, remarks of Senator Charles Ellis

Senator Larry Edwin Craig and Senator Thomas Allen Coburn; see, e.g., *id.*, 2315–16, remarks of Representative Clifford Bundy Stearns (introducing House bill); *id.*, 18,057, remarks of Senator Craig ("[t]hese predatory lawsuits are aimed at bankrupting the firearms industry" and "all seek the same goal of forcing law-abiding businesses selling a legal product to pay for damages from the criminal misuse of that product," which would threaten "a domestic industry that is critical to our national defense" and jeopardize "hundreds of thousands of good paying jobs"); *id.*, 18,058, remarks of Senator Coburn ("[A]nti-gun activists have found another way to constrict the right to bear arms and attack the Bill of Rights and attack the [United States] [c]onstitution, and that is through frivolous litigation. . . . [These] novel lawsuits . . . are not intended to create a solution. They are intended to drive the gun industry out of business by holding manufacturers and dealers liable for the intentional and criminal act[s] of third parties over whom they have absolutely no control."); see also *id.*, 18,070, remarks of Senator William H. Frist; *id.*, 18,072–73, remarks of Senator Lindsey Graham; *id.*, 18,073, remarks of Senator Orrin Grant Hatch; *id.*, 18,914, remarks of Senator Kathryn Ann Bailey Hutchison; *id.*, 18,924, remarks of Senator Jefferson Beauregard Sessions III.

Turning beyond the more sweeping remarks, to the extent that there is legislative history illuminating the meaning of the predicate exception, it "reflect[s] the

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Schumer ("[I]t is shocking that we would spend our time giving unwarranted and unprecedented immunity to an industry whose products, when allowed into the hands of the wrong people, do incredible harm to innocent Americans. We even put off working on a defense bill to do this favor to the gun lobby.").

understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations." *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1137. Thus, the legislative debate, much of which was intended to provide assurances that the arms act would not preempt claims against the dealers who violated numerous firearms sale laws in selling the Bushmaster rifle used by the beltway snipers; see, e.g., H.R. Rep. No. 109-124, p. 92H.R. Rep. No. 109-124, p. 92 (2005), remarks of Representative Melvin L. Watt; supports an interpretation of predicate statutes as those specifically regulating the sale or marketing of firearms, such as those governing the tracking of inventory by firearms dealers.[17] For example,

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[17] I disagree with the majority's circular reliance on statements of legislators indicating that the arms act protects "'law-abiding'" gun dealers and manufacturers, as suggesting that encompasses those who do not engage in violations of unfair trade practices acts. See, e.g., 151 Cong. Rec. 18,057 (2005), remarks of Senator Craig (observing that actions against firearms industry "all seek the same goal of forcing law-abiding businesses selling a legal product to pay for damages from the criminal misuse of that product"); *id.*, 19,137, remarks of Senator Craig ("[w]hat we have crafted is a very narrow exemption from predatory lawsuits seeking to hold legitimate, law-abiding people responsible for the harm done by the misdeeds of people over whom they have no control"); *id.*, 23,024, remarks of Representative Charles Foster Bass (arguing that arms act "protects licensed and law abiding firearms and ammunitions manufacturers and sellers from lawsuits that seek to hold them responsible for the crimes that third party criminals commit"). These statements, which are ambiguous and no more illuminating than the purpose of eliminating "frivolous" lawsuits, prove too much, as the arms act by its very terms shields gun manufacturers and dealers from the consequences of violating numerous laws, both common and statutory in nature, such as California's general tort statutes. See *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1136–38. Put differently, these remarks do nothing to answer the core question in the present appeal, which requires this court to consider whether

Senator Craig explained that the "bill does not shut the courthouse door," insofar as "plaintiffs will have the opportunity to argue that their case falls under the exception, such as violations of [f]ederal and [s]tate law . . . that you have knowingly sold a firearm to a person who cannot legally have it or who you have reason to believe could use it for a purpose other than intended. That all comes under the current definition of [f]ederal law." 151 Cong. Rec. 18,057–58 (2005). In contending that the arms act does not reduce "personal accountability" for firearms manufacturers, given its exceptions, Senator Coburn emphasized that "gun manufacturers and sellers are already policed enough, too much, through hundreds of pages of statutes, hundreds of pages of regulations. To name a few sources of regulations of guns and ammunition: the Internal Revenue Code, including the National Firearms Act postal regulations restricting shipping of handguns; [f]ederal explosive law; regulations for gunpowder and ammunition manufacture; the Arms Export Control Act; the Commerce Department export regulations; the Department of Transportation regulations on ammunition explosives and hazardous material transport. In addition to keeping explicit records that can be inspected by . . . the Bureau of Alcohol, Tobacco, Firearms, and Explosives, licensed dealers have to conduct a [f]ederal criminal background check . . . All retail gun buyers are screened to the best of the [g]overnment's ability." *Id.*, 18,059–60; see also *id.*, 19,119, remarks of Senator Sessions (emphasizing that arms act "allows lawsuits for violation of contract, for negligence, in not following the rules and regulations and for violating any law or regulation that is part of the

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such laws are indeed within the contemplation of the predicate exception.

complex rules that control sellers and manufacturers of firearms"). Similarly, when introducing the final Senate bill in the House, Representative Phil Gingrey explained that the predicate exception "would specifically allow lawsuits against firearms dealers such as the dealer whose firearm ended up in the hands of the [beltway] snipers who failed to maintain a required inventory list necessary to ensure that they are alerted to any firearm thefts." *Id.*, 23,020.

Moreover, the majority does not cite, and my independent research has not revealed, any legislative history indicating that state unfair trade practice statutes were within the contemplation of Congress in enacting the predicate exception. Other statements indicate that such statutes were not contemplated as predicates, and that supporters of the arms act specifically rejected the viability of claims arising from the advertising of firearms. For example, arguing in support of the arms act, Senator Hatch criticized pending actions against gun manufacturers, observing that these "lawsuits, *citing deceptive marketing or some other pretext*, continue to be filed in a number of [s]tates, and they continue to be unsound. *These lawsuits claim that sellers give the false impression that gun ownership enhances personal safety or that sellers should know that certain guns will be used illegally*. That is pure bunk. Let's look at the truth. The fact is that none of these lawsuits are aimed at the actual wrongdoer who kills or injures another with a gun—none. Instead, the lawsuits are focused on legitimate, law-abiding businesses."[18] (Emphasis added.) 151 Cong.

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[18] I recognize that the statements of opponents may be of limited value in discerning legislative intent. See, e.g., *National Woodwork Manufacturers Assn.* v. *National Labor Relations Board*, 386 U.S. 612, 639–40, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967) ("[W]e have often

Rec. 18,073; see also *id.* (noting that arms act "provides carefully tailored protections for legitimate lawsuits, such as those where there are knowing violations of gun sale laws").

Finally, congressional concerns about vague standards leading to liability also support a reading of the predicate exception that is limited to firearms industry-specific statutes, rather than statutes of general applicability such as CUTPA. For example, in arguing in the House Judiciary Committee—seemingly inexplicably—*against* an amendment that would clarify that the arms act allows actions against gun dealers who knowingly sell firearms to a person who is on the violent gang and terrorist watch list maintained by the Department of Justice, Representative Christopher B. Cannon argued that "the vast number of cosponsors of this bill would agree that the burden here should be on the [g]overnment to identify people and not create a vague standard that could be used again to destroy gun manufacturers with lawsuits that don't have clarity, but cost a great deal of money." H.R. Rep. No. 109-124H.R.

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cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." [Internal quotation marks omitted.]). I find it telling, however, that Senator Edward Kennedy, in opposing the arms act, expressly recognized that it would protect firearms manufacturers who engage in just the kind of advertising that the plaintiffs in the present case claim is immoral in violation of CUTPA. Senator Kennedy stated that the "bill will even protect manufacturers that promote military-style weapons for use in battle in urban scenarios against any foe at any range. It protects manufacturers who brag about their weapons of war and spread them to our streets." 151 Cong. Rec. 19,121–22; see also *id.* ("Look at this advertisement from Vulcan: 'Vulcan Armament, the weapons of the special forces. From Afghanistan to Iraq, the guns of the special forces are now on sale in America.").

Rep. No. 109-124, supra, p. 126. Likewise, arguing in support of the arms act, Senator John Thune emphasized that the exceptions, including for violating the law in the production or sale of a firearm, "are not arbitrary standards . . . ." 151 Cong. Rec. 19,119 (2005).

Similarly, in opposing a bill amendment that would provide an exception to the arms act for "gross negligence" or "reckless conduct," Senator John Cornyn argued that the breadth of those terms "would actually gut the very underlying purpose of this legislation" because the pleading of such claims would broaden the scope of the discovery involved, and allow for greater harassment of the manufacturers via the litigation process. *Id.*, 18,918. Senator Jon Llewellyn Kyl described the amendment as "a poison pill for the entire bill because, in effect . . . if you allege gross negligence or recklessness, then the exemption the bill provides evaporates. So you are a lawyer. All you do is allege gross negligence or recklessness and, bingo, you are back in court again. So it totally undercuts the purpose of this legislation."[19] *Id.*, 18,919; see also *id.*, 18,921, remarks of

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[19] Opponents of the proposed amendment to provide an exception to the arms act for "gross negligence" or "reckless conduct" also described it as unnecessary because they viewed such acts as likely to violate an existing federal or state statute. See 151 Cong. Rec. 18,919 (2005), remarks of Senator Kyl ("[Firearm manufacture and sale] is a highly regulated industry by law, by [f]ederal law and [s]tate law and even some local laws. And most of the acts that would meet the definition of gross negligence would already be in violation of law. And if they are in violation of law, they are not exempted from this legislation. We don't try to exempt any gun manufacturer for conduct which is in violation of law."); *id.*, 18,922, remarks of Senator Hatch ("[v]irtually any act that would meet the definition of gross negligence referenced in this amendment would already be a violation of [f]ederal, [s]tate or local law, and therefore would not receive the protection of this law anyway"); *id.*, 19,118,

Senator Craig (arguing that gross negligence exception would render arms act "relatively meaningless as to where we are in relation to the kind of junk or dilatory lawsuits that are currently being filed against gun manufacturers and gun dealers who not only produce a legal product to the market but sell it in the legal context"). Senator Graham similarly emphasized how statutes affect a manufacturer's duty of care, stating that the arms act "doesn't let a seller or a distributor off the hook for violating a statute or making a sale illegally because it says, if you violate the law that exists, then you have broken a duty. Duty can be established by relationships. It can [also] be established by a statute. So this bill does not allow someone to sell a gun without following the procedures that we have set out to sell a gun. It doesn't allow someone to make a gun that is unsafe. You are on the hook, and you can be held accountable based on a simple negligence theory or a negligence per se theory if you violate a specific statute during the sale of a gun or manufacturing of a gun. But what this bill prevents, and I think rightfully so, is establishing a duty along this line: That you have a responsibility, even if you do a lawful transaction or make a safe gun, for an event that you can't control, which is the intentional misuse of a weapon in a criminal fashion by another person. That is the heart of this bill. It doesn't relieve you of duties that the law imposes upon you to safely manufacture and to carefully sell. But we are not going to extend it to a concept where you are responsible, after you have done everything right, for

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remarks of Senator Craig (discussing rejection of gross negligence exception and arguing that arms act "does not take away the standards of law and the specifications within the [f]ederal law today as it relates to the responsible and legal operation and performance of a gun manufacturer or a licensed [f]ederal firearms dealer").

what somebody else may do who bought your product and they did it wrong and it is their fault, not yours. So it does not matter whether you use a gross negligence standard, a simple negligence standard, you have blown by the concept of the bill in my opinion. The debate should be, is there a duty owed in this country for people who follow the law, manufacture safely, sell within the confines of the laws we have written at the [s]tate and [f]ederal level to the public at large if an injury results from the criminal act of another? If that ever happens, this country has made a major change in the way we relate to each other and a major change in the law." *Id*., 18,920. Accordingly, I conclude that the legislative history demonstrates that Congress contemplated that only those statutes providing clear standards with respect to the sale and marketing of firearms would serve as predicate statutes.

## V
## CONCLUSION

On the basis of my review of the text, case law, canons of construction, and legislative history, I conclude that predicate statutes under the predicate exception to the arms act, 15 U.S.C. § 7903 (5) (A) (iii), are limited to those specific to the sale and manufacture of firearms.[20]

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[20] My research indicates that the limited academic commentary on this issue also supports this interpretation of the predicate exception. See K. Armstrong, "Nigh-Impenetrable: Firearm Manufacturer Liability under the Protection of Lawful Commerce in Arms Act in a Post-*Heller* World," 28 Geo. Mason U. C.R. L.J. 173, 195 (2018) ("[s]tatutes qualifying for the predicate exception must not be of general applicability and cannot be codified general tort claims"); R. Sorensen, "The Ninth Circuit Forecloses a Bullet Sized Hole in the PLCAA in *Ileto* v. *Glock*, 565 F.3d 1126 (9th Cir. 2009)," 35 S. Ill. U. L.J. 573, 595 (2011) ("[F]uture courts should only find statutes expressly regulating the firearm industry to be 'applicable to the sale

Compare *Phillips* v. *Lucky Gunner, LLC*, 84 F. Supp.3d 1216, 1219–20, 1224 (D. Colo. 2015) (concluding in case arising from movie theater mass shooting that plaintiffs had not pleaded facts against ammunition sellers indicating knowledge of shooter's conduct and mental condition before shootings, and had not claimed that firearms sellers engaged in "noncompliance with the regulatory requirements applicable to [over the counter] sales," or that "the . . . defendants' had any knowledge of the sales made by the others or by the local firearms

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or marketing of firearms.' It is through this narrow definition that the [arms act's] intended goal is realized."); see also J. Sonner, "A Crack in the Floodgates: New York's Fourth Department, the PLCAA, and the Future of Gun Litigation After *Williams* v. *Beemiller*," 61 Buff. L. Rev. 969, 984 (2013) ("The elusive definition remains—a law applicable to gun sales or marketing whose violation proximately causes harm for which relief is sought—without any clarification of 'applicable.' The Second Circuit hinted at a [less strict] approach, but no clear standard has emerged to determine whether a law or regulation *indirectly* concerning the gun industry may serve as a predicate statute." [Emphasis in original; footnote omitted.]); S. Wagman, "No One Ever Died from Copyright Infringement: The Inducement Doctrine's Applicability to Firearms Manufacturer Liability," 32 Cardozo L. Rev. 689, 720 (2010) ("While it is apparent that the [arms act] is meant to protect firearms manufacturers from third party liability in instances of unintentional support of third party gun violence, instances in which manufacturers have induced harm should not be barred under [the arms act]. When manufacturers either intentionally or recklessly support illegal firearms markets, they are inducing a public nuisance; therefore the predicate exception should be triggered and claims should be allowed to proceed."); but see J. Selkowitz, Note, "Guns, Public Nuisance, and the PLCAA: A Public Health-Inspired Legal Analysis of the Predicate Exception," 83 Temp. L. Rev. 793, 827–28 (2011) (suggesting that examples in predicate exception are consistent with promotion of public health, permitting maintenance of statutory public nuisance action "alleging that the gun industry, in violation of statute, created an environment dangerous to the public's health").

dealers"), and *Jefferies* v. *District of Columbia*, 916 F. Supp.2d 42, 45–46 (D.D.C. 2013) (claims against assault rifle manufacturer arising from shooting by third party are preempted by arms act when only statute pleaded was District of Columbia's Assault Weapons Manufacturing Strict Liability Act, D.C. Code § 7-2551 [2001]), with *Corporan* v. *Wal-Mart Stores East, LP*, United States District Court, Docket No. 16-2305-JWL (JWL), 2016 WL 3881341 (D. Kan. July 18, 2016) (concluding that proposed amendments to complaint saved it from preemption because allegations supported "plausible claim" that defendants' "knowingly violated certain specific provisions of the Gun Control Act of 1968," 18 U.S.C. § 921 et seq., with respect to straw purchase of firearm used in shooting), *New York* v. *A-1 Jewelry & Pawn, Inc.*, 252 F.R.D. 130, 132 (E.D.N.Y. 2008) (concluding that arms act preemption was inapplicable because "there are alleged in the instant action substantial violations of specific federal laws applicable to the sale and marketing of firearms which allegedly proximately cause harm to the [plaintiff]" including prohibitions on straw purchasing and violation of state nuisance statute specifically applicable to firearms [emphasis omitted]), and *Williams* v. *Beemiller, Inc.*, 100 App. Div. 3d 143, 148–50, 952 N.Y.S.2d 333 (2012) (concluding that plaintiffs "sufficiently alleged that defendants' knowingly violated various federal and state statutes applicable to the sale or marketing of firearms within the meaning of the . . . predicate exception" when they alleged that federally licensed firearms dealer knowingly sold multiple handguns to straw purchaser under circumstances suggesting "trafficking in the criminal market rather than for their personal use because [1] they had purchased multiple guns on prior occasions; [2] they paid for the guns in cash; and [3] they

selected Hi-Point 9mm handguns, which are 'disproportionately used in crime' and have 'no collector value or interest,'" with accomplice claims stated based on government notifications that "over 13,000 guns they sold had been used in crimes").

To determine whether CUTPA is a predicate statute under this standard, I consider that, as a matter of state law, "CUTPA is, on its face, a remedial statute that broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . [CUTPA] provides for more robust remedies than those available under analogous common-law causes of action, including punitive damages . . . and attorney's fees and costs, and, in addition to damages or in lieu of damages, injunctive or other equitable relief. . . . To give effect to its provisions, [General Statutes] § 42-110g (a) of [CUTPA] establishes a private cause of action, available to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by [General Statutes §] 42-110b . . . ." (Internal quotation marks omitted.) *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 623, 119 A.3d 1139 (2015).

"[Section] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common

law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 409–10, 78 A.3d 76 (2013).

"CUTPA, by its own terms, applies to a broad spectrum of commercial activity. The operative provision of [that] act, § 42-110b (a), states merely that '[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.' Trade or commerce, in turn, is broadly defined as 'the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution *of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state*.' General Statutes § 42-110a (4). The entire act is remedial in character; General Statutes § 42-110b (d); *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 615 n.4, 440 A.2d 810 (1981); and must 'be liberally construed in favor of those whom the legislature intended to benefit.'" (Emphasis added; footnote omitted.) *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 492, 656 A.2d 1009 (1995). "CUTPA, like equity, reaches beyond traditional common law precepts in establishing a fairness standard

designed to grow and broaden and mold [itself] to meet circumstances as they arise . . . . The resolution of claims requiring the application of broadly defined and deeply rooted public values such as the statute's elusive, but [legislatively] mandated standard of fairness . . . has historically been the function of a court of equity."[21]

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[21] I also strongly disagree with the majority's contention that the theory of liability underlying the plaintiffs' CUTPA claims "is not novel" and "does [not] sound in tort," and, therefore, are not within the scope of claims that the arms act seeks to preempt. The Second Circuit has aptly observed that "[u]nfair trade practices found their origin in the common law of torts. . . ." *United States* v. *Meldish*, 722 F.2d 26, 28 (2d Cir. 1983), cert. denied, 465 U.S. 1101, 104 S.Ct. 1597, 80 L.Ed.2d 128 (1984); see also, e.g., *Kenney* v. *Independent Order of Foresters*, 744 F.3d 901, 907 (4th Cir. 2014) (West Virginia unfair trade practices act claim "sounds in tort" given type of relief available under statute and sought in complaint); *Ins. Co. of North America* v. *Della Industries, Inc.*, 998 F. Supp. 159, 164 (D. Conn. 1998) (CUTPA is tort claim for purposes of assignment under Uniform Commercial Code), vacated on other grounds, 229 F.3d 1135 (2d Cir. 1999); R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2018) § 2.1, p. 13 (noting that CUTPA "has brought both expanded remedies and broad and indefinite substantive standards to the law of business torts"). Given the potential for liability and remedy available under CUTPA, which is broader than that available at common law; see, e.g., *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 159, 645 A.2d 505 (1994); I disagree with the logic behind the majority's premise that Congress intended the arms act to preempt state common-law claims, but leave undisturbed even broader sources of liability under state unfair trade practice statutes like CUTPA. See *District of Columbia* v. *Beretta U.S.A. Corp.*, supra, 940 A.2d at 171 n.6 (court relied on findings in 15 U.S.C. § 7901 [a] [3] and [7], and rejected plaintiffs' reliance on congressional expression of "concern with liability actions 'without foundation in hundreds of years of the common law' and that 'do not represent a bona fide expansion of the common law'" as standing for proposition that "Congress was substantially less troubled by the existence of statutory liability actions reflecting judgments 'by the legislatures of the several [s]tates'" because "[n]o

(Citations omitted; internal quotation marks omitted.) *Associated Investment Co. Ltd.Partnership* v. *Williams Associates IV*, 230 Conn. 148, 159, 645 A.2d 505 (1994); see also *id.*, at 161–62, 645 A.2d 505 (no state constitutional right to jury trial of CUTPA claim).

In summary, whether this court agrees with Congress or not, in adopting the arms act, Congress adopted findings and statements of purpose in 15 U.S.C. § 7901; see footnote 1 of this dissenting opinion; which made very clear its intent to absolve defendants' like these—gun manufacturers and distributors—from liability for criminal use of firearms by third parties except in the most limited and narrow circumstances and, particularly, to shield them from novel or vague standards of liability.[22] This court is obligated, therefore, to construe

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such distinction . . . is reflected either in the definition of a 'qualified civil liability action' or in the enumerated actions excluded therefrom, including the predicate exception; and to posit one all the same would ignore [Congress'] objection to '[l]awsuits" as a class [unless excepted] that 'seek money damages and other relief [against manufacturers and sellers] for the harm caused by the misuse of firearms by third parties, including criminals'" [emphasis omitted]).

[22] I disagree with the majority's argument that the sponsors of the arms act "emphasized that their primary concern was *not with lawsuits such as the present action*, in which individual plaintiffs who have been harmed in a specific incident of gun violence seek to hold the sellers responsible for their specific misconduct in selling the weapons involved. . . . Many proponents indicated that their intent was to preclude the rising number of instances in which municipalities and 'anti-gun activists' filed 'junk' or 'frivolous' lawsuits targeting the entire firearms industry." (Citation omitted; emphasis added.) The majority's assertion that the sponsors of the arms act did not desire to foreclose claims by individual plaintiffs who had suffered specific harm from an instance of gun violence is an overly generous reading of the legislative history. The legislative history indeed indicates that Congress specifically rejected proposed amendments that would have provided two groups of politically

the predicate exception to the arms act, 15 U.S.C. § 7903 (5) (A) (iii), narrowly in light of that clear expression of congressional intent. See, e.g., *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 697–98, 189 A.3d 79 (2018) ("[i]t is not the province of this court, under the guise of statutory interpretation, to legislate . . . a [particular] policy, even if we were to agree . . . that it is a better policy than the one endorsed by the legislature as reflected in its statutory language" [internal quotation marks omitted]). Put differently, "[w]hen we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 520, 949 A.2d 1092 (2008). My analysis of the relevant statutory text, case law, canons of construction, and legislative history demonstrates that Congress intended to limit predicate statutes under that exception to those statutes that relate specifically to the sale and manufacture of firearms.[23] Consequently, I

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sympathetic individual plaintiffs, namely children and law enforcement officers injured in the line of duty, with relief from the strictures of the arms act. See 151 Cong. Rec. 19,116–17 (2005), remarks of Senator Frank Raleigh Lautenberg (proposing exception for children); *id.*, 19,125–26, remarks of Senator Jon Stevens Corzine (proposing law enforcement exception); H.R. Rep. No. 109-124H.R. Rep. No. 109-124, supra, pp. 64–65, remarks of Representative Sheila Jackson Lee (proposing exemption for children); H.R. Rep. No. 109-124H.R. Rep. No. 109-124, supra, pp. 110–11, remarks of Representative Zoe Lofgren (describing potential effect of arms act on case of New Jersey police officers who brought action against gun dealer who sold weapons to straw buyer despite his suspicions).

[23] I agree with the majority that the "regulation of advertising that threatens the public health, safety, and morals has long been

strongly disagree with the majority's conclusion that CUTPA, which is a broadly drafted state unfair trade practices statute applicable to all commercial entities in a variety of factual circumstances, comes within that exception.[24] Instead, I would conclude that, because

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considered a core exercise of the states' police powers." See, e.g., *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541–42, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). Nevertheless, I find overbroad the majority's reliance on the well established presumption that "Congress does not intend to supersede the historic police powers of the [s]tates absent clear intent . . . ." (Internal quotation marks omitted.) *Federal Housing Finance Agency* v. *Nomura Holding America, Inc.*, 873 F.3d 85, 112 n.30 (2d Cir. 2017); see also, e.g., *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). The majority's heavy reliance on this presumption elevates it beyond the more holistic preemption inquiry undertaken when the statutory language is ambiguous, as we consider the statute's "structure and purpose . . . as a whole as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (Citation omitted; internal quotation marks omitted.) *Medtronic, Inc.* v. *Lohr*, supra, at 486, 116 S.Ct. 2240. In contrast, my review of the legislative history, and particularly the remarks of members of Congress expressing their concerns over the breadth of a gross negligence exception and the potential for vague standards of liability, indicates that Congress would not have contemplated letting a broadly worded state unfair trade practice statute like CUTPA be used to eviscerate its intent to protect firearms manufacturers and dealers from litigation arising from shootings perpetrated by third parties. See part IV of this dissenting opinion.

[24] I also note that the majority observes that certain members of Congress "were committed to Americans' second amendment freedoms and sought to secure those freedoms by immunizing firearms companies from frivolous lawsuits." Citing recent federal cases considering the constitutionality of bans on "assault weapons" and "high capacity magazines," the majority also notes, however, that "[i]t is not at all clear . . . that the second amendment's

CUTPA, both in its statutory text and in its implementation under the cigarette rule, reaches a range of commercial conduct that far exceeds the manufacture, marketing, and sale of firearms, it is not by itself a predicate statute. That state unfair trade practices statutes had not been used to hold firearms manufacturers civilly liable to crime victims[25] renders the

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protections even extend to the types of quasi- military, semiautomatic assault rifles at issue in the present case." See, e.g., *Kolbe* v. *Hogan*, 849 F.3d 114, 136 (4th Cir.) (AR-15 with high capacity magazine is "weapon of war" excluded from second amendment coverage), cert. denied, --- U.S.---, 138 S.Ct. 469, 199 L.Ed.2d 374 (2017); *New York State Rifle & Pistol Assn., Inc.* v. *Cuomo*, 804 F.3d 242, 257–61 (2d Cir. 2015) (assuming, arguendo, that second amendment protections extend to assault rifles, but concluding that ban on such weapons survives intermediate scrutiny). My review of the legislative history and statutory text does not indicate any intent by Congress to identify predicate statutes by examining various nuances of second amendment law. Because the degree to which the second amendment protects the AR-15 is, therefore, not at issue in this appeal, I do not consider that question further.

[25] The majority states that it "must [be] presum[ed] that Congress was aware, when it enacted [the arms act], that both the [Federal Trade Commission] Act and state analogues such as CUTPA have long been among the primary vehicles for litigating claims that sellers of potentially dangerous products such as firearms have marketed those products in an unsafe and unscrupulous manner." The majority then cites cases from this state for the proposition that "CUTPA . . . has been applied to the sale of firearms," and decisions from other jurisdictions for the proposition that "regulation of firearms advertising in our sister states frequently has been accomplished under the auspices of state consumer protection and unfair trade practice laws." In my view, these decisions stand only for the proposition that wide reaching unfair trade practice statutes are as applicable to the firearms industry as they are to any other business; they have nothing at all to do with the arms act or the predicate exception. See *Melton* v. *Century Arms, Inc.*, 243 F. Supp.3d 1290, 1296–97, 1305–1306 (S.D. Fla. 2017) (rifle owners

brought, inter alia, Florida unfair trade practices act claim arising from advertising and sale of AK-47 rifles with known design defect that allows accidental discharge); *FN Herstal, S.A.* v. *Clyde Armory, Inc.*, 123 F. Supp.3d 1356, 1375–76 and n.105 (M.D. Ga. 2015) (firearms manufacturer brought trademark infringement claims against firearms distributor and retailer under federal Lanham Act and Georgia deceptive trade practices law), aff'd, 838 F.3d 1071 (11th Cir. 2016), cert. denied, --- U.S.---, 137 S.Ct. 1436, 197 L.Ed.2d 649 (2017); *Beretta U.S.A. Corp.* v. *Federal Ins. Co.*, 117 F. Supp.2d 489, 492 (D. Md. 2000) (whether products hazard liability exclusion in commercial general liability policy relieved insurer of duty to defend and indemnify firearms manufacturer against claims of violations of state unfair trade practices statutes arising from "deceptive marketing and advertising of its products, by promoting the false notion that gun ownership and possession of handguns in the home increases one's security"), aff'd, 17 Fed. Appx. 250 (4th Cir. 2001); *People* v. *Arcadia Machine & Tool, Inc.*, Docket No. 4095 (VPD), 2003 WL 21184117, *26 (Cal. Super. April 10, 2003) (denying summary judgment in pre-arms act case on claim that Ohio gun distributor engaged in deceptive advertising "by advertising banned assault weapons in a manner that is likely to mislead potential California purchasers to believe that purchase and possession of such weapons is lawful, thereby creating an illegal market for such firearms in California"), aff'd sub nom. *In re Firearm Cases*, 126 Cal. App. 4th 959, 24 Cal. Rptr.3d 659 (2005); *American Shooting Sports Council, Inc.* v. *Attorney General*, 429 Mass. 871, 882, 711 N.E.2d 899 (1999) ("[T]he Attorney General's regulatory authority under [state unfair trade practices act] regarding defective products is not limited to marketing and disclosure issues as the plaintiffs contend. His authority properly extends to regulating the sale of a product as unfair or deceptive when the product is defective in ways which a purchaser would not anticipate or the product is not as warranted, and to regulating in a manner which coordinates [unfair trade practices] liability with legislation declaring certain acts unlawful."); Opinions, N.M. Atty. Gen. No. 77-23 (July 19, 1977) p. 149 ("There is nothing in [statute prohibiting carrying of firearms in liquor establishment] which makes it unlawful to advertise the sale of firearms in a liquor establishment, but since the liquor establishment cannot sell firearms, the advertising of the sale of firearms in the liquor establishment would constitute false advertising and an unfair or deceptive trade practice. . . . Of course, this is not intended to

mean that the advertising of firearms as a general principle is forbidden in liquor establishments, but that any business establishment could not advertise something that it does not sell since that would be in violation of the statutes cited." [Citations omitted.]).

The majority's reliance on two Connecticut cases, namely, *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001), and *Salomonson* v. *Billistics, Inc.*, Superior Court, judicial district of New London, Docket No. CV-88-508292, 1991 WL 204385 (September 27, 1991), for the proposition that CUTPA has been previously applied to the sale and marketing of firearms is similarly unavailing. As the majority recognizes, this court's decision in *Ganim* was limited to a conclusion that municipalities lacked standing to pursue claims against firearms manufacturers and sellers for harms arising from gun violence. *Ganim* v. *Smith & Wesson Corp.*, at 365, 780 A.2d 98. Indeed, the court specifically declined to address the substantive legal issues presented in that case, including whether firearms manufacturers and sellers may be held liable under CUTPA for "unfair and deceptive advertising" and "unfair and deceptive sales practices," as supported by allegations that the firearms manufacturers and dealers "marketed and sold their handguns in a manner that causes harm to individuals, especially young children in Bridgeport; marketed and sold their handguns in a manner that contributes to homicides, suicides and accidental deaths in Bridgeport; and engaged in a campaign of misrepresentation concerning the dangers of their handguns" and that they "sell excessive numbers of guns to individual buyers, knowing or having reason to know that some or all of those guns are not for personal use, and are likely to be resold illegally and used to commit crimes; and sell guns that fail to incorporate feasible safety devices that would prevent misuse by unauthorized and unintended users." *Id.*, at 334–36. Accordingly, this court's decision in *Ganim* about the plaintiffs' standing in that case has absolutely no precedential value with respect to the viability of a CUTPA claim founded on the "immoral advertising" of firearms.

The Superior Court's decision in *Salomonson* is even more inapposite than *Ganim*. *Salomonson*, which is a report of an attorney trial referee rather than a decision of a judge of the Superior Court, does not involve crime or victims of crime, but instead is a routine business dispute, in which the court held that a gun fabricator violated CUTPA by failing to perform under a

plaintiffs' CUTPA claims particularly novel in the contemplation of Congress; see 15 U.S.C. § 7901 (a) (7) (2012); and, thus, subject to preclusion under the arms act.[26] I conclude, therefore, that the arms act preempts the plaintiffs' claims of immoral advertising in violation of

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contract to convert three semi-automatic rifles to fully automatic weapons, including by obtaining necessary federal regulatory approvals. See *Salomonson* v. *Billistics, Inc.*, supra, Superior Court, Docket No. CV-88-508292.

[26] The majority speculates about what Congress would have intended with respect to preemption in relation to an elaborate hypothetical about a "terrible crime like the ones involved in the Sandy Hook massacre" perpetrated by a "troubled young man" who had watched a firearms seller's "explicit advertisements depicting and glorifying school shootings, and pro-mot[ing] its products in video games, such as 'School Shooting,' that glorify and reward such unlawful conduct." The majority posits that "even the most ardent sponsors of [the arms act] would not have wanted to bar a consumer protection lawsuit seeking to hold the supplier accountable for the injuries wrought by such unscrupulous marketing practices." The majority then observes "that is not this case, and yet the underlying legal principles are no different. Once we accept the premise that Congress did not intend to immunize firearms suppliers who engage in truly unethical and irresponsible marketing practices promoting criminal conduct, and given that statutes such as CUTPA are the only means available to address those types of wrongs, it falls to a jury to decide whether the promotional schemes alleged in the present case rise to the level of illegal trade practices and whether fault for the tragedy can be laid at their feet." I do not share the majority's apparent optimism about the 109th Congress, which passed the arms act; specifically, until those who ply their judicial craft at One First Street tell me differently, I do not believe that they would have been inclined to allow the use of a broadly drafted statute like CUTPA to hold a firearm manufacturer or seller involved in such a hypothetical liable for anything more than thoughts and prayers. Put differently, the arms act would preempt recourse unless the immoral and repugnant practices described by the majority violated a statute or regulation specifically governing the manner in which firearms may be advertised or marketed, as opposed to a more broadly applicable statute like CUTPA.

CUTPA.[27] I, therefore, respectfully disagree with part V of the majority's opinion, and I would affirm the judgment of the trial court in its entirety.

Accordingly, I respectfully dissent.

[27] I emphasize that my conclusion is limited to CUTPA claims that do not rely on firearms-specific statutes as their source of public policy, insofar as I conclude only that CUTPA itself is not a predicate statute. Put differently, I do not conclude that the arms act preempts all CUTPA causes of action, but only that the predicate exception does not save those that do not allege the violation of a firearms-specific regulation or statute. See *Ileto* v. *Glock, Inc.*, supra, 565 F.3d at 1133 (noting distinction between right of action and predicate statute for purposes of arms act); cf. *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 139, 2 A.3d 859 (2010) ("[a]lthough CUTPA is primarily a statutory cause of action . . . it equally is recognized that CUTPA claims may arise from underlying causes of action, such as contract violations or torts, provided the additional CUTPA elements are pleaded" [citation omitted]).

## APPENDIX B

Superior Court of Connecticut,
Judicial District of Fairfield at Bridgeport.
Donna L. Soto, Administratrix Estate of Victoria L. Soto et al.
v.
Bushmaster Firearms International, LLC et al.
FBTCV156048103S
|
October 14, 2016

Bellis, J.

I
BACKGROUND

On January 26, 2015, the plaintiffs, William D. Sherlach, Natalie Hammond, and the administrators or executors[1] of the estates of Victoria L. Soto, Dylan C. Hockley, Mary J. Sherlach, Noah S. Pozner, Lauren G. Rousseau, Benjamin A. Wheeler, Jesse McCord Lewis, Daniel G. Barden, and Rachel M. D'Avino, filed this action for damages and injunctive relief against the defendants, Bushmaster Firearms International, LLC,

[1] The names of the administrators and executors of the estates are as follows: Donna L. Soto, administratrix of the estate of Victoria L. Soto; Ian and Nicole Hockley, co-administrators of the estate of Dylan C. Hockley; William D. Sherlach, executor of the estate of Mary J. Sherlach; Leonard Pozner, administrator of the estate of Noah S. Pozner; Gilles J. Rousseau, administrator of the estate of Lauren G. Rousseau; David C. Wheeler, administrator of the estate of Benjamin A. Wheeler; Neil Heslin and Scarlett Lewis, co-administrators of the estate of Jesse McCord Lewis; Mark and Jacqueline Barden, co-administrators of the estate of Daniel G. Barden; and Mary D'Avino, administratrix of the estate of Rachel M. D'Avino.

Freedom Group, Inc., Bushmaster Firearms, Bushmaster Firearms, Inc., Bushmaster Holdings, LLC, Remington Arms Co., LLC, and Remington Outdoor Company (collectively, Remington defendants); Camfour, Inc. and Camfour Holding, LLP (collectively, Camfour defendants); and Riverview Sales, Inc. and David LaGuercia (collectively, Riverview defendants). On January 15, 2015,[2] the Remington defendants, with the consent of the Camfour and Riverview defendants, removed the case to the United States District Court for the District of Connecticut on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332.[3] The plaintiffs filed a motion to remand, and the District Court, Chatigny, J, ultimately agreed with the plaintiffs, and ordered the case to be remanded to this court on October 9, 2015.

In their thirty-three-count amended complaint dated October 29, 2015, the plaintiffs allege the following facts. On the morning of December 14, 2012, Adam Lanza entered Sandy Hook Elementary School, located in Newtown, Connecticut, carrying a Bushmaster AR-15 rifle, model XM15–E2S. Lanza then used the weapon, which was designed for military use and engineered to deliver maximum carnage with extreme efficiency, to kill

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[2] While this action was not filed in this court until January 26, 2015, the action was, in fact, commenced by service of process on the defendants at various dates in December of 2014 and January of 2015. Accordingly, the Remington defendants were able to file a motion for removal to federal court on January 15, 2015, before the filing of the action in this court actually occurred.

[3] Title 28 of the United States Code, § 1332, provides in relevant part: "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) Citizens of different States . . ."

twenty-six people, including the plaintiffs' decedents, and to wound others, including Natalie Hammond, in less than five minutes. The weapon had been bought by Lanza's mother to give to and/or share with her son.

The plaintiffs further allege that the defendants, all makers and sellers of the Bushmaster XM15–E2S, know that civilians are unfit to operate AR-15s, and yet continue selling the Bushmaster XM15–E2S to the civilian market, disregarding the unreasonable risks that the weapon poses "outside of specialized, highly regulated institutions like the armed forces and law enforcement," in an effort to continue profiting from the weapon's sale. In addition, the defendants knew, or should have known, the following: the sale of assault rifles like the XM15–E2S to the civilian market posed an unreasonable and egregious risk of physical injury to others, as a mass casualty event was within the scope of the risk created both by the Remington defendants' marketing and by the defendants' sale of the XM15–E2S to the civilian market; there was an unreasonably high risk that the XM15–E2S would be used in a mass shooting to inflict maximum casualties before law enforcement was able to intervene; schools are particularly vulnerable to—and frequently targets of—mass shootings; the utility of the XM15–E2S for hunting, sporting, or self-defense was negligible in comparison to the risk that the weapon would be used in its assaultive capacity; and the XM15–E2S, when used in its assaultive capacity, would be likely to inflict multiple casualties and serious injury.

The plaintiffs also allege that, despite this knowledge, the Remington defendants "unethically, oppressively, immorally, and unscrupulously marketed and promoted the assaultive qualities and military uses of AR-15s to civilian purchasers," and all of the defendants

"unethically, oppressively, immorally, and unscrupulously promoted the sale of AR–15s with the expectation and intent that possession and control of these weapons would be shared with and/or transferred to unscreened civilian users following purchase, including family members." Moreover, the Remington defendants knew, or should have known, that the Camfour defendants' use of the product—supplying it to dealers who sell directly to civilians—involved an unreasonable risk of physical injury to others, while the Camfour defendants knew, or should have known, that the Riverview defendants' use of the product supplying it to the civilian population—involved an unreasonable risk of physical injury to others.[4]

Counts one through nine and thirteen through thirty of the amended complaint sound in wrongful death[5]

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[4] The amended complaint also expressly alleges that the Camfour defendants and the Riverview defendants are qualified product sellers within the meaning of 15 U.S.C. § 7903(6). Section 7903(6) of title 15 of the United States Code provides in relevant part: "The term 'seller' means, with respect to a qualified product—(A) an importer. . . who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code . . .; (B) a dealer . . . who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code . . .; or (C) a person engaged in the business of selling ammunition . . . in interstate or foreign commerce at the wholesale or retail level."

[5] The wrongful death claims are brought pursuant to General Statutes § 52-555, which provides in relevant part: "(a) In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including

against the three groups of defendants on behalf of the plaintiffs' decedents. These counts allege that the defendants' conduct was a substantial factor resulting in the injuries, suffering, and death of the plaintiffs' decedents in that the decedents suffered terror, ante-mortem pain and suffering, destruction of the ability to enjoy life's activities, destruction of earning capacity, and death. These counts also allege that as a result of the injuries and deaths of the plaintiffs' decedents, their estates incurred funeral expenses to their financial loss. Counts ten through twelve sound in loss of consortium against the three groups of defendants by William Sherlach, the husband of Mary J. Sherlach. Finally, counts thirty-one through thirty-three are brought against the three groups of defendants by Natalie Hammond, alleging that the defendants' conduct was a substantial factor resulting in the injuries of Hammond in that she suffered terror; pain and suffering; severe, permanent, and painful injuries to her left calf, foot, thigh, and hand; destruction of the ability to enjoy life's activities; and destruction of earning capacity. Hammond also alleges she incurred medical expenses to her financial loss. Within each of these thirty-three counts, the plaintiffs allege that the defendants' conduct constituted a knowing violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

On April 22, 2016, the Remington defendants,[6] Camfour defendants,[7] and Riverview defendants[8] each

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funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

[6] The Remington defendants specifically move to strike counts one, four, seven, ten, thirteen, sixteen, nineteen, twenty-two, twenty-five,

filed a motion to strike the amended complaint for failure to state legally sufficient claims upon which relief may be granted, on the grounds that the defendants are immune from the claims by virtue of the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. § 7901 et seq. (2012),[9] because they have not sufficiently alleged causes of action that are permitted under any exception to immunity set forth in PLCAA, namely, the negligent entrustment exception, 15 U.S.C. § 7903(5)(A)(ii),[10] and/or the predicate exception, 15 U.S.C. § 7903(5)(A)(iii).[11] On

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twenty-eight, and thirty-one. These particular counts constitute the entirety of the allegations against the Remington defendants contained in the amended complaint.

[7] The Camfour defendants specifically move to strike counts two, five, eight, eleven, fourteen, seventeen, twenty, twenty-three, twenty-six, twenty-nine, and thirty-two. These particular counts constitute the entirety of the allegations against the Camfour defendants contained in the amended complaint.

[8] The Riverview defendants move to strike counts three, six, nine, twelve, fifteen, eighteen, twenty-one, twenty-four, twenty-seven, thirty, and thirty-three. These particular counts constitute the entirety of the allegations against the Riverview defendants contained in the amended complaint.

[9] Title 15 of the United States Code, § 7902(a), provides that "[a] qualified civil liability action may not be brought in any Federal or State court." A "qualified civil liability action" is "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . 15 U.S.C. § 7903(5)(A) (2012).

[10] Title 15 of the United States Code, § 7903(5)(A)(ii), provides: "The term 'qualified civil liability action' . . . shall not include . . . an action brought against a seller for negligent entrustment or negligence per se . . ."

[11] Title 15 of the United States Code, § 7903(5)(A)(iii), provides in relevant part: "The term 'qualified civil liability action' . . . shall not

May 27, 2016, the plaintiffs filed an omnibus objection to the defendants' motions to strike, and on June 10, 2016, the Remington and Camfour defendants filed reply memoranda. Oral argument on the motions was heard on June 20, 2016, at which time the court reserved judgment.

## II
## DISCUSSION

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). A motion to strike "requires no factual findings by the trial court . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . Moreover, [the court notes] that [w]hat is necessarily implied [in an allegation] need not be expressly alleged . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 350, 71 A.3d 480 (2013).

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include . . . an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . ."

A

Negligent Entrustment Exception to PLCAA

Pursuant to PLCAA, and subject to certain exceptions enumerated therein, "causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended," are prohibited.[12] 15 U.S.C. § 7901(b)(1) and § 7902(a) (2012). One such exception, which is set forth in 15 U.S.C. § 7903(5)(A)(ii), permits "an action brought against a seller for negligent entrustment." PLCAA specifically defines "negligent entrustment" as "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B) (2012). "[A]n action brought against a seller for negligent entrustment"; 15 U.S.C. § 7903(5)(A)(ii) (2012); is exempt from the PLCAA definition of a qualified, and therefore prohibited, civil liability action. 15 U.S.C. §§ 7902, 7903 (2012).

The parties disagree as to which law the plaintiffs' negligent entrustment claims must comply with in order to satisfy PLCAA's negligent entrustment exception Connecticut state law on negligent entrustment, the statutory definition set forth in PLCAA, or both. In their memorandum of law, the Remington defendants contend

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[12] The parties do not dispute that, unless one of the exceptions enumerated in PLCAA applies, the plaintiffs' action against the defendants would be barred by PLCAA's immunity provisions.

that "[a] viable state law action that fits within an exception is not prohibited under the PLCAA" and recognize that "relevant state law must be examined to determine whether a plaintiff has pleaded a cause of action that fits within a narrowly defined exception to immunity." The arguments in their brief, however, pertain solely to the negligent entrustment exception set forth in PLCAA. The Camfour defendants aver that the plaintiffs have failed to allege legally sufficient negligent entrustment claims pursuant to both Connecticut law and PLCAA. Finally, the Riverview defendants adopt the other defendants' contentions, but they argue exclusively under PLCAA. At oral argument, counsel for the plaintiffs contended that "the sufficiency of [their] claim[s] should be about Connecticut law and it shouldn't be about PLCAA."

There is no appellate authority on this issue. In one decision, the Superior Court found that "[The PLCAA definition of negligent entrustment] is consistent with Connecticut law on negligent entrustment . . ." *Gilland* v. *Sportsmen's Outpost, Inc.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04–CV-09-5032765–S (May 26, 2011, Shapiro, J.), appeal dismissed, Appellate Court, Docket No. AC 33926 (November 17, 2011), cert. denied, 303 Conn. 938, 36 A.3d 696 (2012). Nonetheless, because "[i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions"; (internal quotation marks omitted); *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010); the court must presume "that there is a purpose behind every sentence, clause, or phrase used in [PLCAA] . . . that no part of [the] statute is superfluous . . . [and that] [e]very word and phrase . . . [has] meaning . . ." (Internal quotation marks omitted.) *Id.*

Although PLCAA explicitly preserves claims that fall within its enumerated exceptions, such as negligent entrustment actions, it does not create them. 15 U.S.C. § 7903(5)(A)(ii) and (5)(C) (2012). PLCAA explicitly provides that "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C) (2012). By its own terms, therefore, PLCAA cannot be read as creating a cause of action. Accordingly, the court concludes that for a plaintiffs negligent entrustment claim to be permitted under PLCAA. it must arise under state law. See *Phillips* v. *Lucky Gunner, LLC*, 84 F.Sup.3d 1216 (2015) ("Although the PLCAA identifies negligent entrustment as an exception to immunity, it does not create the cause of action . . . Accordingly, the claim arises under state law"). Nonetheless, because Congress specifically included a definition of "negligent entrustment" in PLCAA, the court presumes that the definition serves a purpose and carries a meaning beyond merely referencing state common-law claims. Therefore, any state law negligent entrustment claim must also satisfy the PLCAA definition of "negligent entrustment." See, e.g., *Delana* v. *CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016), reh'g denied (May 24, 2016) ("a state-law claim may continue to be asserted . . . if it falls within the definition of a 'negligent entrustment' claim provided in the PLCAA"). Accordingly, the court will examine whether the plaintiffs' allegations meet the requirements for negligent entrustment claims under both Connecticut common law and the statutory definition set forth in PLCAA.

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Negligent Entrustment Pursuant to Connecticut Law

All three defendant groups argue, with varying levels of specificity, that the plaintiffs have not alleged legally

sufficient negligent entrustment claims pursuant to Connecticut law. The Camfour defendants, whose state law argument is most fully developed, contend that their entrustees, the Riverview defendants: (1) are not alleged to have used the firearm in a way that created an unreasonable risk; (2) are not alleged to have been incompetent; and (3) did not directly cause the harm. The plaintiffs counter that the sufficiency of their claims depends on the element of foreseeability and urge the court to adopt their argument that the defendants foresaw, or should have foreseen, that entrustment of an AR-15 to civilians, as a class, in a civilian environment created an unreasonable risk of harm, including the risk that the firearm would be used in a mass shooting in a school setting. In their reply memorandum, the Camfour defendants argue that "civilians" cannot constitute a "class of persons" for purposes of negligent entrustment.

Negligent entrustment has existed as a cognizable tort in Connecticut for at least one hundred years. In 1916, without using the term "negligent entrustment," our Supreme Court addressed whether parents were negligent for putting a shotgun in the hands of their nearly sixteen-year-old son. *Wood* v. *O'Neil*, 90 Conn. 497, 498-500, 97 A. 753 (1916). Although the opinion does not set forth the parameters of this cause of action, it is notable that the court concluded that the claim must fail, in part, due to the lack of evidence that the parents had knowledge that their son would misuse the shotgun. Four years later, that court considered whether a "defendant was negligent in entrusting to . . . 'an unlicensed, reckless young man, a loaded revolver, in violation of the statute laws of the state, when it knew, or by the exercise of reasonable care might have known, that he was an unfit and reckless person and liable to fall into a passion, and in that it did not select a proper and fit

person for the duties assigned him' . . ." *Turner* v. *American District Telegraph & Messenger Co.*, 94 Conn. 707, 711-12, 110 A. 540 (1920). In that case, the Supreme Court noted the necessity of establishing the entrustor's knowledge of the entrustee's incompetence. It explained: "Another condition stated is that the defendant, when it sent [the shooter] forth with a revolver, knew or ought to have known that he was a reckless person, liable to fall into a passion and unfit to be entrusted with a deadly weapon upon such an occasion. We have examined with care the testimony and fail to find even a scintilla of evidence that the defendant had or ought to have had knowledge or even suspicion that [the shooter] possessed any of the traits rightly or wrongly attributed to him by the plaintiff. Without this vitally important fact the plaintiff's claim falls to the ground . . . ." *Id.*, 716. In other words, the court held that the plaintiff's claim could not succeed without evidence that the defendant had., or should have had, knowledge or suspicion about the entrustee's traits.

Since *Turner*, courts have discussed negligent entrustment mostly in the automobile context. *Lewis* v. *Burke*, Superior Court, judicial district of Hartford, Docket No. CV-10-6011976-S (November 28, 2014, Elgo, J.); but see *Gilland* v. *Sportsmen's Outpost, Inc., supra*, Superior Court, Docket No. X04-CV-09-5032765-S (negligent entrustment of a handgun and ammunition); *Kalina* v. *Kmart Corp.*-Superior Court, judicial district of Fairfield, Docket No. CV-90¬269920-S (August 5, 1993, Lager, J.) (negligent entrustment of a rifle and ammunition). "The Connecticut Supreme Court first recognized a cause of action for negligent entrustment of an automobile in *Greeley* v. *Cunningham*, 116 Conn. 515, 165 A. 678 (1933)." *Davis* v. *Elrac*, LLC, Superior Court, judicial district of New Haven, Docket No. CV-13-

6037866-S (September 26, 2014, Wilson, J.). "Superior Court cases applying the negligent entrustment doctrine established in *Greeley* note that *Greeley* adopted the approach set forth in the Restatement of Torts. See, e.g., *Morin* v. *Keddy*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV-90-701113-S (October 25, 1993, Hennessey, J.) (10 Conn. L. Rptr. 281); *Hughes* v. *Titterton*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 292024 (July 13, 1987, Wagner, J.) (2 C.S.C.R. 8452 C.S.C.R. 845)." *Jordan* v. *Sabourin*, Superior Court, judicial district of New London, Docket No. 537041 (November 22, 1996, Hurley, J.T.R.) (18 Conn. L. Rptr. 269, 270). Section 390 of the Restatement (Second) of Torts provides that "[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them." 2 Restatement (Second), Torts § 390 (1965).

Comment (b) to § 390 explains: "This Section deals with the supplying of a chattel to a person incompetent to use it safely, irrespective of whether the chattel is to be used for the suppliers' purposes or for the purpose of him to whom it is supplied. In the one case as in the other, liability is based upon the rule . . . that the actor may not assume that human beings will conduct themselves properly if the facts which are known or should be known to him should make him realize that they are unlikely to do so. Thus, one who supplies a chattel for the use of another who knows its exact character and condition is not entitled to assume that the other will use it safely if

the supplier knows or has reason to know that such other is likely to use it dangerously, as where the other belongs to a class which is notoriously incompetent to use the chattel safely, or lacks the training and experience necessary for such use, or the supplier knows that the other has on other occasions so acted that the supplier should realize that the chattel is likely to be dangerously used, or that the other, though otherwise capable of using the chattel safely, has a propensity or fixed purpose to misuse it. This is true even though the chattel is in perfect condition, or though defective, is capable of safe use for the purposes for which it is supplied by an ordinary person who knows of its defective condition." 2 Restatement (Second), *supra*, § 390, comment (b).

As several Superior Court decisions have recognized, our appellate case law has not altered the doctrine of negligent entrustment from that which was announced in *Greeley*. See, e.g., *Short* v. *Ross*, Superior Court, judicial district of New Haven, Docket No. CV-12-6028521-S (February 26, 2013, Wilson, J.) (55 Conn. L. Rptr. 668, 671); *Angione* v. *Bloom*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5012285 (January 5, 2012, Adams, J.T.R.) (53 Conn. L. Rptr. 347, 350); *Snell* v. *Norwalk Yellow Cab, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-5013455-S (May 24, 2011, Jennings, J.T.R.) (52 Conn. L. Rptr. 43, 47). Nonetheless, it is generally accepted that "entrustment plainly means *permitting another to do something or to use something*." (Emphasis in original; internal quotation marks omitted.) *Bryda* v. *McLeod*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV-03-0285188-S (July 12, 2004, Tanzer, J.) (37 Conn. L. Rptr. 492, 494); accord *Czulewicz* v. *Raymond, Superior Court*, judicial district of Stamford-Norwalk, Docket No. CV-89-0100248-S

(November 20, 1990, Cioffi, J.) (3 Conn. L. Rptr. 531, 532).

More specifically, the Superior Court has determined that an entrustment can be considered negligent only if (1) there is actual or constructive knowledge that the entrustee is incompetent or has a dangerous propensity, and (2) the injury resulted from that incompetence or propensity. See, e.g., *Arocho* v. *Simonelli*, Superior Court, judicial district of Stamford–Norwalk, Docket No. CV-12-6013221–S (June 23, 2015, Adams, J.T.R.); *Kaminsky* v. *Scoopo*, Superior Court, judicial district of New Haven, Docket No. CV-08-6002084–S (July 30, 2008, Bellis, J.) (46 Conn. L. Rptr. 82, 83). "Actual knowledge is based on incompetency or a failure to appreciate some visible or demonstrable impairment . . . whereas constructive knowledge . . . is based on facts that are openly apparent or readily discernible." (Internal quotation marks omitted.) *Morillo* v. *Georges*, Superior Court, judicial district of Hartford, Docket No. CV-15-6058761–S (December 31, 2015, Peck, J.) (61 Conn. L. Rptr. 541, 544). Whether actual or constructive, knowledge "is the essential element of a cause of action for negligent entrustment." *Beale* v. *Martins*, Superior Court, judicial district of Waterbury, Docket No. CV-13-6020940–S (December 1, 2015, Brazzel–Massaro, J.) (61 Conn. L. Rptr. 389, 390) ("[w]ithout the key allegation of knowledge, the plaintiff has not sufficiently pled a claim for negligent entrustment"); see also *Kaminsky* v. *Scoopo, supra*, 83.

Other states that base their negligent entrustment doctrine on Section 390 of the Restatement (Second) of Torts similarly focus on the element of foreseeability of

the entrustee's misuse of the chattel.[13] For example, in New York,[14] "[t]he tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the *entrustee's propensity* to use the chattel in an improper or dangerous fashion." (Emphasis added.) *Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 237, 750 N.E.2d 1055, 727 N.Y.S.2d 7, opinion after certified question answered, 264 F.3d 21 (2d Cir. 2001); *Al–Salihi* v. *Gander Mountain, Inc.*, United States District Court, Docket No. 3:11–CV–00384 (NAM) (N.D.N.Y. September 20, 2013) (concluding "that the 'negligent entrustment' exception does not apply" because "there [was] simply no evidence demonstrating that prior to the sales of the [weapons at issue], [defendant] knew or should have known that [entrustee] posed an unreasonable risk of harm to himself or others"); see also *Gummo* v. *Ward*, 57 F.Sup.3d 871, 876-77 (M.D.Tenn. 2014) ("[t]he focus of the tort of negligent entrustment is the degree of knowledge the supplier of the chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion" [internal quotation marks omitted]);[15] *McGuiness* v. *Brink's, Inc.*, 60 F.Sup.2d 496, 500 (D.Md. 1999) ("The cause of action for negligent entrustment is

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[13] Negligent entrustment is a common-law tort. *Ellis v. Jarmin*, Superior Court, judicial district of New London, Docket No. CV-09-5010839 (December 17, 2009, Cosgrove, J.) (49 Conn. L. Rptr. 1, 3 n.2). In the context of a common-law claim, courts may look outside of their own jurisdiction for guidance. *State v. Courchesne*, 296 Conn. 622, 680-81 n.39, 998 A.2d 1(2010).

[14] "Under New York law, a claim for negligent entrustment of a dangerous instrumentality is based on the Restatement (Second) of Torts § 390 . . ." *Breitkopf v. Gentile*, 41 F.Sup.3d 220, 274 (E.D.N.Y. 2014).

[15] "Tennessee recognizes the tort of negligent entrustment as found in section 390 of the Restatement of Torts." *Id.*, 876.

based on the requisite knowledge of the supplier of the chattel. If the supplier knows or should know of the entrustee's propensities to use the chattel in an improper or dangerous manner, the entrustor owes a duty to foreseeable parties to withhold the chattel from the entrustee." [Internal quotation marks omitted.])[16]

Within Connecticut and other Restatement states, two general lines of negligent entrustment cases have emerged. The first line of cases involves the entrustment of an automobile to an incompetent driver, who then drives the vehicle in a dangerous way and injures another. In the automobile context, it has been stated that "Connecticut law is clear that liability can only be imposed if the defendant entrusts the vehicle to the driver." *Angione* v. *Bloom*, Superior Court, judicial district of Stamford–Norwalk, Docket No. CV-08-5006850–S (October 6, 2011, Jennings, J.T.R.). The plaintiffs have cited a handful of cases, including two Superior Court decisions, that call this principle into question and seemingly recognize liability via more attenuated entrustments. In *Delprete* v. *Senibaldi*, Superior Court, judicial district of New Haven, Docket No. CV-11-6024795–S (September 16, 2014, Wilson, J.), the plaintiff asserted a negligent entrustment claim against the defendant Enterprise. Enterprise owned a vehicle that it leased to Tresor Kapila, another defendant, who then allowed Dina Senibaldi, a third defendant, to operate the vehicle. Senibaldi collided with the motor vehicle in which the plaintiff's decedent was a passenger. As is relevant to the present case, the plaintiff alleged "that the defendant Enterprise 'knew or

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[16] Maryland has adopted the doctrine of negligent entrustment as stated in Section 390 of the Restatement (Second) of Torts. *Broadwater v. Dorsey*, 344 Md. 548, 554, 688 A.2d 436 (1997).

should have known that the lessee was renting the vehicle for an unqualified and/or unlicensed operator,' namely . . . Senibaldi . . . Thus, there [was] an issue of whether the defendant Enterprise may be liable under a theory of negligent entrustment of a vehicle to a lessee who was not operating the vehicle during the accident and whether liability may be imposed when the entrusted vehicle was being operated by a non-lessee individual." *Id.* Relying on two other Superior Court decisions that addressed a similar issue, the court concluded that the legal sufficiency of the plaintiff's claim hinged upon whether the plaintiff had pleaded that "it was foreseeable at the time of the rental that Kapila would give a non-lessee permission to drive the car." *Id.* *Delprete* relies explicitly on *Galloway* v. *Thomas*, Superior Court, judicial district of New Haven, Docket No. CV-95-0371814–S (September 26, 1995, Corradino, J.) (15 Conn. L. Rptr. 143), which is the second Superior Court decision to which the plaintiffs in the present case cite. In *Galloway*, the court held that "[t]he missing link in the plaintiffs [negligent entrustment] theory of recovery [was] . . . the failure to allege [that the entrustor] knew or should have known [that the entrustee] would permit another to drive the car." *Id.*, 144. Although the plaintiffs are correct that the requirements of negligent entrustment may be satisfied under more attenuated circumstances, there remains the requirement that the original entrustor have knowledge of the entrustee's propensities that caused harm to the plaintiffs.

Other cases further support the conclusion that negligent entrustment claims must fail if the defendant lacked knowledge of the entrustee's propensities. A case relied on by the plaintiffs, *LeClaire* v. *Commercial Siding & Maintenance Co.*, 308 Ark. 580, 826 S.W.2d 247 (1992), is one such case. In *LeClaire*, "[t]he complaint

alleged that [the defendant] Commercial owned the vehicle in which LeClaire was a passenger when the injury occurred. Commercial had entrusted the vehicle to its employee, Garcia, who became intoxicated and further entrusted the vehicle to another person . . . It was further alleged that . . . prior to entrusting Garcia with the vehicle [Commercial] knew, or should have investigated and learned, that Garcia 'frequently became intoxicated' and had moving traffic violations." *Id.*, 581-82. The court stated: "The real rub in this case is the fact that it involves two entrustments. That is not a bar to recovery . . . Other jurisdictions have recognized that an original entrustor may be liable for negligence in entrusting a chattel to one who further entrusts it, resulting in injury." *Id.*, 583. Although the defendant attempted to distinguish its case on the ground that, in a seemingly analogous case, "the ultimate entrustee was in the vehicle with the knowledge or consent of the original entrustor when the vehicle was entrusted to the first entrustee . . . [the court] faile[d] to see how knowledge of, consent to, or even approval by the original entrustor of the presence of the person to whom the chattel is ultimately entrusted ma[de] a difference if liability of the original entrustor is predicated upon negligence in entrusting the chattel to the original entrustee." *Id.* The court paid particular attention to the issues of proximate cause and foreseeability and "conclude[d] [that] the complaint stated facts upon which relief could be granted for negligent entrustment." *Id.*, 585. Thus, this case supports the conclusion that the entrustor must have knowledge of the original entrustee's propensities to misuse the chattel in order to prevail on a claim for negligent entrustment.

These principles are not limited to automobile cases. The second line of negligent entrustment decisions

involves the entrustment of something other than a vehicle in a "[circumstance] where an entrustor should know that there is cause why a chattel ought not to be entrusted to another." *Short* v. *Ross*, *supra*, 55 Conn. L. Rptr. 668, 672; see, e.g., *Bernard* v. *Baitch*, Superior Court, judicial district of Stamford–Norwalk, Docket No. CV-09-5013017–S (March 22, 2011, Jennings, Jr., J.T.R.) (51 Conn. L. Rptr. 604, 607-08) (allegations that parents supplied son with medications and drugs knowing son "had threatened and acted to harm himself in the past . . . had been diagnosed and treated for mental illness . . . and . . . was not taking [a specific drug] in accordance with his prescription" formed legally sufficient negligent entrustment claim). As they did in the automobile context, the plaintiffs have identified a handful of cases from outside of the automobile context that support attaching liability for more remote entrustments. Nevertheless, these cases similarly make clear that negligent entrustment claims in this context also require that the entrustor had knowledge of the original entrustee's propensities toward misuse of the chattel in order for such a claim to succeed.

In *Earsing* v. *Nelson*, 212 A.D.2d 66, 629 N.Y.S.2d 690 (1995), the plaintiff, Earsing, "was injured when he was hit by a BB shot from a gun that was manufactured by defendant Daisy . . . and sold by defendant Service . . . to defendant . . . Nowinski, a 13–year-old boy. After purchasing the gun, Nowinski gave it to a 17–year-old friend, defendant . . . Garvey, for safekeeping. [The] [p]laintiffs allege[d] that Garvey accidentally shot . . . Earsing with the BB gun, not knowing it was loaded at the time." *Id.*, 69. On appeal, the "plaintiffs argue[d] that they ha[d] stated causes of action against Daisy as well as Service for negligent entrustment and illegal sale of the air gun." *Id.* The court explained: "The tort of

negligent entrustment is based on the degree of knowledge the supplier of a chattel had or should have had concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion . . . If such knowledge can be imputed, the supplier owes a duty to foreseeable parties to withhold the chattel from the entrustee . . . Gun sales to children have been included in that category . . . There is no authority, however, to extend liability on this theory against Daisy, the manufacturer of the air gun . . . and thus the [lower] court properly dismissed that cause of action against it." *Id.*, 70.

The New York Court of Appeals considered a similarly remote entrustment scenario in *Rios* v. *Smith*, 95 N.Y.2d 647, 744 N.E.2d 1156, 722 N.Y.S.2d 220 (2001). In *Rios*, the plaintiff was injured in an ATV accident that occurred while the plaintiff, her younger sister, and the defendants Frank Smith, Jr., and Theodore Persico, Jr. (Persico, Jr.)—all teenagers—were staying at a residence located on a farm owned by the defendant Alphonse Persico (Persico). *Id*, 650. Persico owned at least two ATVs and kept them at this residence. *Id.* "On the day of the accident, Persico was not present at the farm. Persico, Jr. and Smith, each operating an ATV, asked [the] plaintiff and her sister to go for a ride on the vehicles. When the young women consented, [the] plaintiff climbed aboard the ATV driven by Smith and her sister rode with Persico, Jr. At some point during the excursion, the operators rode the vehicles onto a blacktop pathway that was lined with trees, and proceeded to perform 'wheelies,' lifting the front wheel of the vehicle off the ground. As the young men then began to race, Smith drove the ATV he was operating off the pathway and up a grassy incline. [The] [p]laintiff suffered serious injuries when the vehicle hit a tree,

causing her to be thrown against the tree trunk, with the ATV coming to rest on top of her." *Id.* The plaintiff asserted, among other claims, a negligent entrustment cause of action against Persico. *Id.* The court first discussed parental liability for negligent entrustment and held that "a parent owes a duty to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control." *Id.*, 653. Reviewing the evidence, the court found that "Persico could have clearly foreseen that his son's access to and use of the ATVs could involve riding one of the vehicles while lending the other to a friend and that such use might expose passengers on the ATVs to injury. Thus, the evidence was legally sufficient for the jury to determine that Persico created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son, whose use of the vehicles involved lending one of the ATVs to Smith, another minor." *Id.*

Finally, in *Collins* v. *Arkansas Cement Co.*, 453 F.2d 512 (8th Cir. 1972), the court considered whether there was sufficient evidence to sustain a theory of negligent entrustment against an employer who had entrusted cherry bombs to an employee who then gave cherry bombs to children who subsequently passed them along to a minor who was injured when they exploded. The court stated: "While the proof must show that the entrustor knew or should have known of the entrustee's propensities, the notice . . . that employees were not faithful in returning the unused cherry bombs or were using them in horseplay around the plant was sufficient evidence of misuse, which when coupled with the lax control exercised over their use and the return of unused bombs, was sufficient to make a submissible case . . . Having reason to know of the misuse to which the cherry

bombs were being put and the possible tragic results upon such instrumentalities coming into the hands of children, especially those of a tender age, the injury here was clearly foreseeable and was proximately caused by the negligent entrustment." (Footnote omitted.) *Id.*, 515.

In the present case, the court agrees with the plaintiffs that the theory of common-law negligent entrustment rests on the foreseeability of the likelihood of misuse of the chattel. Nevertheless, regardless of whether a direct entrustee or a third person ultimately causes the injury, the dispositive issue is whether the entrustor knows or should know of the direct entrustee's incompetence. See *LeClaire* v. *Commercial Siding & Maintenance Co.*, *supra*, 308 Ark. 580 (negligence of initial entrustment dispositive). This incompetence can arise from trusting a chattel to someone else in a situation in which such entrustment is improper or constitutes misuse. See, e.g., *Delprete* v. *Senibaldi, supra*, Superior Court, Docket No. CV-11-6024795–S (giving nonlessee permission to drive car could constitute misuse and, if foreseeable, render renter incompetent); *Galloway* v. *Thomas, supra*, 15 Conn. L. Rptr. 143 (same); *Earsing* v. *Nelson, supra*, 212 A.D.2d 66 (entrusting gun to child is negligent because children as a class are deemed incompetent to handle guns and will therefore foreseeably misuse them in unspecified ways); *Rios* v. *Smith, supra*, 95 N.Y.2d 647 (teenager's lending ATV to someone else constitutes misuse and, if foreseeable, renders teenager incompetent); *Collins* v. *Arkansas Cement Co.*, *supra*, 453 F.2d 512 (negligent to entrust cherry bombs to employees who misuse them by regularly not returning them or using them in

horseplay).[17] If the element of foreseeability with regard to the direct entrustee's misuse is lacking, the negligent entrustment claim must fail.

The court recognizes that there is a fundamental disagreement among the parties regarding the nature of the plaintiffs' allegations. The defendants characterize the complaint as alleging successive entrustments. Accordingly, the defendants' arguments address the entrustments from the Remington defendants to the Camfour defendants, from the Camfour defendants to the Riverview defendants, and from the Riverview defendants to Nancy Lanza. Under this scenario, the successive entrustees are the Camfour defendants, the Riverview defendants, and Nancy Lanza, and it is their propensities and purported "uses," putting the firearm in inventory and selling it, keeping the firearm on a shelf and then making it available to a law-abiding, approved buyer, and storing it in a home, respectively, that are at issue.

The plaintiffs, on the other hand, have explicitly stated that their claims are not dependent on these parties' propensities; instead, the plaintiffs argue, "in a top-down case like this [the court looks] to the propensities of a class of individuals and the environment in which those individuals are likely to use [the instrument]." In other words, the plaintiffs suggest that a claim of negligent entrustment can be sufficiently alleged

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[17] The New York Court of Appeals has specifically stated: "The owner or possessor of a dangerous instrument is under a duty to entrust it to a responsible person whose use does not create an unreasonable risk of harm to others . . . The duty may extend through successive, reasonably anticipated entrustees . . ." (Citations omitted.) *Hamilton v. Beretta U.S.A. Corp.*, *supra*, 96 N.Y.2d 236-37.

where the chattel will ultimately reach individuals who are likely to misuse it.

Regardless of which characterization the court adopts, based on the case law set forth above, in order to allege a legally sufficient negligent entrustment claim, the plaintiffs must allege that each entrustment was initially negligent. In other words, the plaintiffs must identify what foreseeable misuse rendered the initial entrustees incompetent. In the operative complaint, the plaintiffs have alleged the following relevant facts: The defendants knew or had reason to know that their respective entrustees were engaging in substantial sales of military caliber AR-15s, meant for specialized, highly regulated institutions, such as the armed forces and law enforcement, to the civilian market on a consistent basis and that such sales would give individuals who are unfit to operate the weapons access to them. Complaint, ¶¶ 9, 12. This, the defendants knew or should have known, posed an unreasonable and egregious risk of physical injury. Complaint, ¶ 213. Finally, each defendant knew, or should have known, that their respective entrustee's use of the product involved an unreasonable risk of physical injury to others. Complaint, ¶¶ 224, 225. Despite this knowledge, the plaintiffs allege, by transferring the XM15–E2S to each entrustee, the defendants continued to entrust the XM15–E2S to the civilian population. Complaint, ¶¶ 171, 172, 176, 177, 178, 182. Accordingly, the plaintiffs allege, selling to the civilian market is a misuse that renders each entrustment tortious.

As discussed further below, this court concludes that such sales do not constitute misuse as a matter of law. The court does not agree with the plaintiffs' assertion that the common law recognizes a class as broad as civilians to support a claim for negligent entrustment. In

*McCarthy* v. *Sturm, Ruger & Co.*, 916 F.Sup. 366, 369 (S.D.N.Y. 1996), aff'd sub nom., *McCarthy* v. *Olin Corp.*, 119 F.3d 148 (2d Cir. 1997), in a situation that is closely analogous to the present case, Judge Baer addressed a similar issue directly. The *McCarthy* plaintiffs "[sought] to hold [the] defendant Olin Corporation liable based on its design, manufacture, marketing and sale of 'Black Talon' ammunition, which was allegedly used by [Colin Ferguson in a murderous shooting spree on a Long Island Railroad passenger train]. Black Talon ammunition incorporates a hollow-point bullet that is designed to expand upon impact exposing razor-sharp edges at a 90-degree angle to the bullet. This expansion dramatically increases the wounding power of the bullets." *Id.*, 368. Among other things, the plaintiffs alleged that Olin Corporation "was negligent in marketing the Black Talon ammunition to the general public . . . [The] [p]laintiffs argue[d] that sales of the ammunition should have been limited to law enforcement agencies, as was allegedly Olin's original plan." (Citation omitted.) *Id.*, 369. More specifically, "[the] plaintiffs argue[d] that marketing Black Talon ammunition to the general public breached a duty flowing from manufacturers to those affected by use of the ammunition." *Id.*, 370. Although the plaintiffs did not explicitly raise a negligent entrustment claim, the court explained: "Restatement (Second) § 390 . . . limits the negligent entrustment theory to those people a reasonable person would consider lacking in ordinary prudence. To extend this theory to the general public would be a dramatic change in tort doctrine. It would imply that the general public lacks ordinary prudence and thus undermine the reasonable person concept so central to tort law. The common law has not yet adopted

a negligent entrustment rule for the protection of the general public. I decline to adopt one here." *Id.*

Even narrower classes of persons have been rejected for purposes of negligent entrustment claims. For example, in 2008, the United States District Court for the Southern District of New York in *Adeyinka* v. *Yankee Fiber Control, Inc.*, 564 F.Sup.2d 265 (S.D.N.Y. 2008), applied the *McCarthy* analysis to resolve whether any reasonable jury could conclude that the defendant was liable for negligent entrustment of an "ultra high pressure water jetting system." *Id.*, 268, 288. The jet was manufactured by Aqua–Dyne, bought from Aqua–Dyne by Yankee Fiber, and leased from Yankee Fiber by the New York City Housing Authority (NYCHA). *Id.*, 267. The plaintiff was hired by NYCHA to perform lead abatement work and was injured while using the water jet to remove lead paint from the walls of a building at a work site. *Id.*, 270. The plaintiff brought multiple causes of action against the defendants, including a negligent entrustment claim against Yankee Fiber. *Id.*, 267. Specifically, the "[p]laintiff allege[d] that Yankee Fiber [was] liable for 'negligent entrustment' because it permitted [the] plaintiff to use the water jet when Yankee Fiber's employees knew plaintiff was likely, 'because of inexperience, to use [the water jet] in an unsafe manner . . . Yankee Fiber assert[ed] that it did not have reason to believe [the] plaintiff, or any other NYCHA employees, were likely to use the water jet in an unsafe manner." (Citation omitted.) *Id.*, 286.

The court analogized the case before it to *McCarthy* and stated, "in this case, [the] plaintiff argues that, while Yankee Fiber did not owe [the] plaintiff a 'special duty,' it owed a duty 'to everyone who was operating this machine' to ensure that they were sufficiently 'experienced' so as to operate the water jet in a

reasonably safe manner . . . The Court rejects this argument as inconsistent with well-settled authority regarding the tort of negligent entrustment. As Judge Baer noted in *McCarthy*, courts have not construed the tort as imposing a duty on defendants to examine the competence of 'the general public' to whom they market or lease products . . . Rather, it is well settled that the tort applies solely where the defendant had knowledge or reason to know that the user of the item at issue was someone that 'a reasonable person would consider lacking in ordinary prudence.'" *Id.*, 287 "Therefore, given the lack of case law supporting [the] plaintiff s broad construction of the tort and the absence of evidence indicating that Yankee Fiber knew or had reason to know of a characteristic or condition 'peculiar to plaintiff indicating that he was 'lacking in ordinary prudence' . . . the Court [found] that no reasonable jury could conclude that Yankee Fiber [was] liable for negligent entrustment." (Citation omitted.) *Id.*, 288.

In the present case, the plaintiffs allege that the defendants' entrustment of the firearm to respective entrustees was negligent because the defendants could each foresee the firearm ending up in the hands of members of an incompetent class in a dangerous environment. The validity of this argument rests on labeling as a misuse the sale of a legal product to a population that is lawfully entitled to purchase such a product. Based on the reasoning from *McCarthy*, and the fact that Congress has deemed the civilian population competent to possess the product that is at issue in this case, this argument is unavailing. To extend the theory of negligent entrustment to the class of nonmilitary, nonpolice civilians—the general public—would imply that the general public lacks the ordinary prudence necessary to handle an object that Congress regards as appropriate

for sale to the general public.[18] This the court is unwilling to do.

Accordingly, because they do not constitute legally sufficient negligent entrustment claims pursuant to state law, the plaintiffs' negligent entrustment allegations do not satisfy the negligent entrustment exception to PLCAA.[19] herefore, unless another PLCAA exception applies, the court must grant the defendants' motions to strike.

2

Negligent Entrustment Pursuant to PLCAA

In light of this court's conclusion above that the plaintiffs' negligent entrustment allegations are legally insufficient under Connecticut's common law, it is not necessary for this court to consider whether those claims meet the narrower definition of such claims set forth in PLCAA. Nevertheless, in the interest of thoroughness, and to provide an alternative basis for this court's decision with regard to the legal sufficiency of the plaintiffs' negligent entrustment claims, the court will also consider whether the plaintiffs' claims satisfy the

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[18] In their reply brief, the Remington defendants contend that the plaintiffs' argument is based on designating the class of adult civilian residents of Connecticut who are legally able to purchase and own the firearm at issue as incompetent. "The entire frame-work of Plaintiffs' argument has no basis in the law and if accepted, would turn the separation of powers between the branches of government on its head." They continue: "If an entirely new 'class' of persons is to be declared ineligible to own firearms . . . the legislature is best-suited to make [that] policy [decision] . . ."

[19] With regard to count thirty-two, the Camfour defendants also argue that Hammond's claim for negligent entrustment is barred by the three-year statute of limitations contained in General Statutes § 52-584. The plaintiff's did not respond to this argument and the court does not reach it.

narrower definition of negligent entrustment under PLCAA.

As is stated above, based on basic tenets of statutory construction, the court finds that no part of PLCAA, including the definition of "negligent entrustment," is superfluous. Again, PLCAA specifically defines "negligent entrustment" as "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B) (2012). As this statutory definition of negligent entrustment claims is narrower than the common-law definition discussed above, the plaintiffs' negligent entrustment claims must satisfy the statutory definition as well in order to fit the negligent entrustment exception to immunity set forth in PLCAA.

a

Seller

Unlike the definition of negligent entrustment set forth in the Restatement, PLCAA's definition of negligent entrustment applies only to entrustment by "a seller" of a qualified product. The Remington defendants argue that the plaintiffs have not sufficiently alleged that the Remington defendants qualify as "sellers" within the definition of PLCAA. The plaintiffs disagree. In relevant part, PLCAA defines a "seller" as "a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18 . . ." 15 U.S.C. § 7903(6)(A) (2012). "The term 'engaged in the business' has the meaning given that term in section 921(a)(21) of

Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition." 15 U.S.C. § 7903(1) (2012).

Section 921(a)(11) of title 18 of the United States Code defines a dealer, in relevant part, as "any person engaged in the business of selling firearms at wholesale or retail . . ." According to subsection (a)(21) of the same section, the term "engaged in business" means, "as applied to a dealer in firearms . . . a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms . . ."

Consistent with the standard applicable to motions to strike, the following facts are taken from the complaint and accepted as true for purposes of this motion. "Defendants know that, as a consequence of selling AR-15s to the civilian market, individuals unfit to operate these weapons gain access to them." Complaint, ¶ 9. "Despite . . . knowledge [about the AR-15] defendants continue to sell the Bushmaster XM15–E2S to the civilian market." Complaint, ¶ 11. "In order to continue profiting from the sale of AR-15s, defendants chose to disregard the unreasonable risks the Bushmaster XM15–E2S posed . . ." Complaint, ¶ 12. "At all relevant times, Bushmaster Firearms manufactured and sold AR-15s." Complaint, ¶ 14. "Upon information and belief, Bushmaster Firearms, Inc. manufactured and sold AR-

15s." Complaint, ¶ 15. "At all relevant times, Bushmaster Firearms International, LLC manufactured and sold AR-15s." Complaint, ¶ 17. "At all relevant times, Remington Arms Company, LLC manufactured and sold AR-15s." Complaint, ¶ 19. "Freedom Group, Inc. is one of the world's largest manufacturers and dealers in firearms, ammunition, and related accessories." Complaint, ¶ 21. "Upon information and belief, from 2006 on, Freedom Group, Inc. controlled, marketed and sold the Bushmaster brand. Upon information and belief, during this time period Freedom Group, Inc. sold Bushmaster brand products directly to retail stores." Complaint, ¶ 22. "Remington Outdoor Company, Inc. . . . is engaged in the business of manufacturing and selling AR-15s." Complaint, ¶ 23. These named defendants "are functionally one entity . . ." Complaint, ¶ 24. These defendants "manufacture and sell firearms and ammunition . . ." Complaint, ¶¶ 25. One or more of these defendants "manufactured and sold the Bushmaster XM15 –E2S rifle that was used in the shooting at Sandy Hook Elementary School on December 14, 2012." Complaint, ¶ 26. "Bushmaster . . . [is] the largest supplier of combat rifles [including the XM15–E2S] to civilians." Complaint, ¶¶ 54, 55. The Bushmaster defendants market the AR-15 rifle. Complaint ¶¶ 75-92, 174-75. "The Bushmaster defendants . . . [sell] directly to Wal-Mart, Dick's Sporting Goods, and other prominent chain retail stores." Complaint, ¶ 172. "The Bushmaster defendants, as those who deal in firearms, are required to exercise the closest attention and the most careful precautions in the conduct of their business." Complaint, ¶ 221.

To qualify as a seller, a dealer: (1) must devote time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of

livelihood and profit through the repetitive purchase and resale of firearms; and (2) must be licensed to engage in business as such a dealer under chapter 44 of title 18. Taking all well-pleaded facts and those facts necessarily implied from the allegations as admitted, and construing the complaint broadly and realistically, the court finds that the plaintiffs have sufficiently alleged that the Remington defendants qualify as sellers as defined by PLCAA. As to the first requirement, the court finds that the plaintiffs have explicitly alleged that the Remington defendants sell and deal firearms to civilians and retail stores and that the Remington defendants devote labor to marketing, promoting, and selling the firearms with the objective of profit. As to the second requirement, although the plaintiffs have not explicitly alleged that the Remington defendants are licensed to engage in business as a dealer under chapter 44 of title 18, this fact is necessarily implied from the allegations. Under subsection (a) of that chapter, "[n]o person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General." That the Remington defendants are allegedly one of the world's largest firearms manufacturers and dealers necessarily implies that they are licensed to manufacture and deal.[20]

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[20] Furthermore, the basis of the Remington defendants' argument is that they are manufacturers, not sellers. PLCAA specifically defines the term "manufacturer" as "a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18." 15 U.S.C. § 7903(2) (2012). Although the Remington defendants argue that the plaintiffs' failure to allege that the Remington defendants are licensed as a dealer is fatal, they ignore the fact that the plaintiffs similarly have

Accordingly, taking all well-pleaded facts and those facts necessarily implied from the allegations as admitted, and construing the complaint broadly and realistically, the court finds that the plaintiffs have sufficiently alleged that the Remington defendants qualify as sellers as defined by PLCAA.

b

Actionable Use

The defendants essentially put forth two arguments: (1) they cannot be held liable for the actions of anyone other than their respective immediate entrustees (the Camfour defendants, the Riverview defendants, Nancy Lanza), and (2) the plaintiffs have not alleged that any of the immediate entrustees "used" the product in accordance with the PLCAA definition of negligent entrustment.[21] They argue for a narrow definition of the term "use" in light of the context in which the term is utilized and the overall purpose of PLCAA. Although they do not provide a specific definition of the term, the defendants contend that "use" cannot include a legal transaction. The plaintiffs counter that the PLCAA definition of negligent entrustment codifies the essential elements of the Restatement definition and, thus, permits actions that satisfy the common-law elements of negligent entrustment. They argue in favor of a broad definition of the term "use" in accordance with its plain

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not explicitly stated that the Remington defendants are licensed as a manufacturer.

[21] The Riverview defendants also assert a foreseeability argument, namely that, because they did not supply the product to Adam Lanza, they could not foresee that the product would be used in a manner involving an unreasonable risk of physical injury to Adam Lanza or others. The court finds that this argument is encompassed by the defendants' first argument.

meaning, statutory context, and common-law roots and assert that selling a weapon can constitute a "use."

Fundamentally, the parties' arguments depend on the meanings of the terms "negligent entrustment" and "use" as utilized in PLCAA. To resolve these questions, the court must engage in statutory interpretation. "With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule . . . because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit . . . Moreover, it is well settled that [t]he decisions of the Second Circuit Court of Appeals carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts." (Internal quotation marks omitted.) *Rodriguez* v. *Testa*, 296 Conn. 1, 11, 993 A.2d 955 (2010).

According to the Second Circuit Court of Appeals, "[w]hen construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature." *New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008), cert. denied, 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed. 675 (2009). "Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well." *United States* v. *Gayle*, 342 F.3d 89, 92 (2d Cir. 2003), as amended (January 7, 2004), cert. denied, 542 U.S. 925, 124 S.Ct. 2888, 159 L.Ed.2d 787 (2004), cert. denied, 544 U.S. 1026, 125 S.Ct. 1968, 161 L.Ed.2d 872 (2005). "The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." (Internal quotation marks omitted.) *Id.*, 93. "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual

evidence of the meaning of the statute shall not be considered . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." *New York* v. *Beretta U.S.A. Corp.*, *supra*, 430.

The Second Circuit has not directly addressed the contours of the PLCAA definition of "negligent entrustment." Therefore, the court begins with the plain text. The plaintiffs argue that the PLCAA definition of "negligent entrustment" mirrors the definition from § 390 of the Restatement. Comparing the two definitions, it is clear that the PLCAA definition of "negligent entrustment" omits the language from § 390 of the Restatement which allows for liability arising from the supplying of a chattel "through a third person." This distinction lends support to the defendants' argument.

The meaning of the term "use" is not as clear. Instead, it is susceptible to more than one reasonable interpretation. The defendants argue for a narrow reading of the term and limit its meaning to some action beyond the mere selling of a firearm. Read in isolation, there is no indication that Congress intended to so limit the definition of the term. To the contrary, when Congress intended to specifically limit a definition, it did so by using more specific verbs such as "to sell"; 15 U.S.C. § 7903(5)(A)(iii)(II) (2012); to "otherwise dispose of"; 15 U.S.C. § 7903(5)(A)(iii)(II) (2012); and to "discharge." 15 U.S.C. § 7903(5)(A)(v) (2012). The plaintiffs argue for a broad reading of the term and place no limit on its meaning. Considering its relationship to the rest of PLCAA, to include "lawfully sell" within the definition of "use" would yield absurd and unreasonable results. Assuming that PLCAA only allows for claims based on direct entrustment, this broad definition of use would extend liability to a dealer who supplies a firearm

to a lawful distributor who legally sells it to an incompetent buyer, and simultaneously forbid these types of indirect negligent entrustment actions from going forward. The definition of the term use, when read in context, is therefore ambiguous. As the previous sentence demonstrates, it also calls into question whether PLCAA allows for attenuated entrustments.

"To resolve . . . textual ambiguity, [courts] may consult legislative history and other tools of statutory construction to discern Congress's meaning . . . Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application. As a general matter, we may consider reliable legislative history where . . . the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant . . . The most enlightening source of legislative history is generally a committee report, particularly a conference committee report, which [the Second Circuit] ha[s] identified as among the most authoritative and reliable materials of legislative history." (Citations omitted; footnote omitted; internal quotation marks omitted.) *United States* v. *Gayle*, *supra*, 342 F.3d 93-94.

As is discussed above, there is an open question as to the meaning of the term "use" in PLCAA and the statute is silent on this issue, which is fundamental to the correct application of the "negligent entrustment" exception. Therefore, the court may consider reliable legislative history. In May 2001, H.R. 2037, the "Protection of Lawful Commerce in Arms Act" was placed on the House calendar. House Committee on the Judiciary Report 108-59, concerning House Bill No. 1036, entitled

"Protection of Lawful Commerce in Arms Act," (April 7, 2003). As is memorialized in House Report 107-727, Representative John Conyers, Jr., from Michigan voiced his concern with the "negligent entrustment" exception. He cautioned that "the bill irresponsibly protects dealers who recklessly sell to gun traffickers knowing (or with reason to know) that the trafficker intends to resell the guns to criminals. This loophole is achieved as a result of the bill's narrow definition of 'negligent entrustment.' The bill defines 'negligent entrustment' to include only initial transfers completed between the original seller and purchaser of a gun. It does not include secondary transfers even when the original seller is aware of the purchaser's intent to resell to a particular individual." House Committee on the Judiciary Report 107–727, concerning House Bill No. 2037, entitled "Protection of Lawful Commerce in Arms Act," (October 8, 2002).

"Days after H.R. 2037 was placed on the House calendar, the Washington, DC area was besieged by a sniper(s) who indiscriminately gunned down innocent victims with a high caliber rifle. In the aftermath of the sniper shooting, no further action was taken on the bill . . ." House Bill No. 1036. H.R. 2037 was the predecessor to H.R. 1036. In 2003, the House of Representatives Committee on the Judiciary issued a Report on H.R. 1036. Representative Conyers again expressed his concerns, only changing the word "loophole" from his previous statement to "exemption from liability." House Bill No. 1036. In the same report, dissenters expressed the following policy concern with the bill: "Only in the narrow class of cases enumerated in Section 4 of the bill (e.g., when a dealer knowingly transferred a gun to someone despite knowing it would be used to commit a crime of violence or a drug trafficking crime, or when the dealer negligently entrusted the gun to a shooter, or a

plaintiff files a negligence per se case) would plaintiffs be permitted to seek relief for their foreseeable injuries." House Bill No. 1036. Later, in a section entitled "The Narrow Exceptions in H.R. 1036 Will Not Protect Most Victims of Gun Industry Negligence," the dissenters articulated their concerns regarding the negligent entrustment exception more particularly. They pointed out that the exception "would cover only cases where the dealer knows or should know that the person who is buying the gun is likely to misuse it and the buyer does, in fact, misuse it. [T]his would still shut the courthouse door to victims of the far more common practice of dealers negligently selling guns to traffickers who, in turn, supply criminals . . . Under [the negligent entrustment] exception, not only would the previously-mentioned Byrdsong[22] case be barred, but the bill would deny relief to . . . former New Jersey police officer Lemongello and his partner, who were shot with a handgun sold as part of a 12–handgun sale by a West Virginia dealer to a 'straw buyer' for a gun trafficker. Even though the dealer who irresponsibly supplied the gun trafficker with multiple guns should have known the guns would be sold to and used by criminals, they arguably did not 'negligently entrust' the guns since the persons to whom they sold the guns were not the shooters." House Bill No. 1036.

In 2005, the Protection of Lawful Commerce in Arms Act was again called up on the floor of the House. As it had years earlier, PLCAA, now labeled H.R. 800,

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[22] "Mr. Byrdsong was walking with his children in Skokie, Illinois when he was shot and killed with one of 72 guns sold to an Illinois gun trafficker by a dealer over a period of a year and a half. The dealer clearly should have known that the trafficker did not need 72 guns for his own use, but intended to sell them to criminals." House Bill No. 1036.

generated cautionary views. Representative Conyers again argued against the bill. He stated: "Here we are today, April 20th on the 6th anniversary of the Columbine shootings, considering a bill that would eliminate the liability of those in the gun industry for marketing to criminals . . . Section 4 of the bill [which was enacted as 15 U.S.C. § 7903] specifically protects gun manufacturers and sellers from liability, even when they produce and distribute weapons that expose unassuming purchasers to unreasonable risks of harm. In addition, the bill protects dealers who recklessly sell to gun traffickers knowing that the trafficker intended to resell the guns to criminals . . . So we've finally gone over the top. Congratulations, Committee on the Judiciary. This is quite a way to mark the sixth anniversary of the Columbine shootings in this country." House Committee on the Judiciary Report 109¬124, concerning House Bill No. 800, entitled "Protection of Lawful. Commerce in Arms Act," (June 14, 2005). As to the "negligent entrustment" exception specifically, the dissenters argued that the section, as written, would protect "the dealer who irresponsibly supplied the gun trafficker with multiple guns [and who] should have known the guns would be sold to and used by criminals, [because] they arguably did not 'negligently entrust' the guns since the persons to whom they sold the guns did not commit the underlying criminal acts." House Bill No. 800.

Despite these concerns, and aware that the only actionable entrustment is from a seller to a buyer who then engages in a criminal act, Congress did not substantively amend PLCAA or the negligent entrustment exception. These comments now serve to highlight PLCAA's narrow definition of the term "negligent entrustment." Clearly, although foreseeability is the essential element to the common-law tort, the same

is not true for the PLCAA definition. In the post-Columbine world, cognizant of the environment in which gun sales occur and undeniably aware of the consequences of narrowly interpreting PLCAA exceptions, Congress contemplated negligent entrustment to include only direct entrustments to a shooter, regardless of what an entrustor knew or should have known.

In the present case, the plaintiffs have alleged that the Remington defendants sold the firearm to the Camfour defendants, that the Camfour defendants sold the firearm to the Riverview defendants, and that the Riverview defendants sold the gun to Nancy Lanza. In addition, it is alleged that Adam Lanza was the individual who actually fired the weapon. Based on the clear intent of Congress to narrowly define the "negligent entrustment" exception, Adam Lanza's use of the firearm is the only actionable use. Accordingly, the plaintiffs have not alleged that any of the defendants' entrustees "used" the firearm within the confines of PLCAA's definition of the term. To the contrary, the plaintiffs have alleged facts that place them directly in the category of victims to which Congress knowingly denied relief.

For these reasons, in addition to the reasons set forth in the preceding section discussing state law, the plaintiffs' allegations against all three defendant groups do not satisfy the negligent entrustment exception to PLCAA.

B

Predicate Exception to PLCAA

The other exception to PLCAA immunity upon which the plaintiffs rely is set forth in 15 U.S.C. § 7903(5)(A)(iii), which permits a plaintiff to bring "an

action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . .” The parties refer to this as the predicate exception. The defendants argue that the amended complaint should be stricken because the plaintiffs’ CUTPA claims are not legally sufficient to satisfy the predicate exception to PLCAA immunity under 15 U.S.C. § 7903(5)(A)(iii). More specifically, the defendants contend that CUTPA does not qualify as a predicate statute pursuant to 15 U.S.C. § 7903(5)(A)(iii) and that, even if it does qualify as such, the plaintiffs’ CUTPA claims are legally insufficient because (a) the plaintiffs are not consumers, competitors, or other business persons with a commercial relationship to the defendants, (b) the plaintiffs have not alleged the type of financial injury that CUTPA was enacted to redress, (c) they are barred by CUTPA’s three-year statute of limitations, (d) they are foreclosed by General Statutes § 52-572n,[23] the exclusivity provision of the Connecticut Product Liability Act (CPLA), and (e) they are barred by General Statutes § 42-110c(a),[24] an exemption provision.

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[23] “The exclusivity provision of the product liability act provides: ‘A product liability claim . . . may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product.’ General Statutes § 52-572n(a).” (Footnotes omitted.) *Gerrity* v. *R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 125-26,818 A.2d 769 (2003).

[24] General Statutes § 42-110c(a), a subsection of CUTPA, provides in relevant part: “Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . .”

1

CUTPA as a Predicate Statute

The defendants first argue that CUTPA does not qualify as a predicate statute pursuant to 15 U.S.C. § 7903(5)(A)(iii) under the plain meaning of PLCAA's text and guiding precedent, because the plaintiffs interpret that exception too broadly in contending that CUTPA has been applied to or "clearly can be said to implicate" the "sale or marketing" of firearms. In response, the plaintiffs argue that the decision of the Court of Appeals for the Second Circuit in *New York* v. *Beretta U.S.A. Corp., supra*, 524 F.3d 384, indicates that CUTPA is an appropriate predicate statute to satisfy the relevant exception to PLCAA immunity.

That exception, 15 U.S.C. § 7903(5)(A)(iii), provides as follows: "The term 'qualified civil liability action' . . . shall not include . . . an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or

receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18 . . ."

There is no appellate authority resolving the issue of whether CUTPA qualifies as a predicate statute or discussing the breadth of the predicate exception. Therefore, under principles set forth previously in this memorandum, the court must follow the plain meaning rule to interpret the federal statute and, accordingly, will look to the decisions of the Second Circuit Court of Appeals as particularly persuasive authority. See *Rodriquez* v. *Testa*, supra, 296 Conn. 11.

In *New York* v. *Beretta U.S.A. Corp.*, *supra*, 524 F.3d 384, the Second Circuit Court of Appeals specifically addressed the meaning of the term "applicable" as Congress used that word in the phrase "statute applicable to the sale or marketing of [firearms]." In *Beretta*, the city of New York brought an action against various firearms manufacturers to decrease the alleged public nuisance caused by the defendants' negligent and reckless merchandising of handguns. While the plaintiffs relied on the dictionary definition of "applicable," i.e., "capable of being applied," the defendants argued that "the phrase 'statute applicable to the sale or marketing of [a firearm]' in the context of the language in the entire statute limits the predicate exception to statutes specifically and expressly regulating the manner in which a firearm is sold or marketed—statutes specifying when, where, how, and to whom a firearm may be sold or marketed." *Id.*, 400. After determining that both groups of parties in *Beretta* relied on a reasonable meaning of the term, the Second Circuit conducted a statutory interpretation of the word using canons of statutory construction and the legislative history of PLCAA. Ultimately, the court held that the exception created by 15 U.S.C. § 7903(5)(A)(iii) "does encompass statutes (a)

that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms; and . . . does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *Id*., 404.

In light of this highly persuasive interpretation of the term "applicable," and because CUTPA does not expressly regulate firearms, the court must next analyze whether: (1) courts have applied CUTPA to the sale and marketing of firearms, or (2) CUTPA clearly can be said to implicate the purchase and sale of firearms. With regard to whether CUTPA is a statute that courts have previously applied to the sale or marketing of firearms, the answer is yes. Specifically, in *Salomonson* v. *Billistics, Inc.*, Superior Court, judicial district of New London, Docket No. CV-88-508292 (September 27, 1991, Freedman, J.T.R.), the court held that "[t]he instant transactions for the sale, manufacture and delivery of remanufacturer weapons to Plaintiff meets the statutory definition of trade or commerce, General Statutes § 42-110a(4) . . ." In addition, in *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001), the plaintiffs, the city of Bridgeport and its mayor, Joseph Ganim, asserted CUTPA claims against the defendants, various firearm manufacturers, trade associations, and retail sellers, arising from the defendants' alleged misconduct in the advertising, marketing, and selling of handguns. *Id*., 315-16, 334-35. Although the Supreme Court ultimately dismissed the CUTPA claims on standing grounds; *Id*, 373; it expressed no concern regarding whether the statute applied to such transactions. To the contrary, the Supreme Court expressly left open the possibility that a CUTPA claim based on a defendant's misleading marketing of firearms could be maintained by appropriate plaintiffs who are less removed than those in

the *Ganim* case. Therefore, the test set forth in *New York* v. *Beretta* is satisfied because the Superior Court has applied CUTPA to the sale and marketing of firearms. Accordingly, CUTPA is a valid predicate statute.

2

Legal Sufficiency of CUTPA Claims

The defendants next argue that, even if CUTPA qualifies as a predicate statute, the plaintiffs' allegations of CUTPA violations do not satisfy PLCAA's predicate exception because they do not constitute legally sufficient CUTPA claims.

a

Relationship Between the Parties

First, the defendants contend that the CUTPA counts are legally insufficient because CUTPA does not provide protection for persons who do not have a consumer or commercial relationship with the alleged wrongdoer, and such a relationship does not exist between the plaintiffs and the defendants in the present action. In response, the plaintiffs argue that any person who suffers any ascertainable loss of money or property may sue under CUTPA, regardless of whether they have a consumer or commercial relationship with the defendant.

"In 1973, when CUTPA was first enacted, the predecessor to § 42-110g contained language that limited standing to [a]ny person who purchases or leases goods or services . . . In 1979, however, the legislature amended [CUTPA], deleting all references to purchasers, sellers, lessors, or lessees . . . Notwithstanding the elimination of the privity requirement, [our Supreme Court] previously ha[s] stated that it strains credulity to conclude that CUTPA is so formless as to provide redress to any person, for any ascertainable harm,

caused by any person in the conduct of any trade or commerce." (Citations omitted; internal quotation marks omitted.) *Vacco* v. *Microsoft Corp.*, 260 Conn. 59, 87-88, 793 A.2d 1048 (2002). More recently in *Pinette* v. *McLaughlin*, 96 Conn.App. 769, 901 A.2d 1269, cert. denied, 280 Conn. 929, 909 A.2d 958 (2006), our Appellate Court reiterated this point, stating that "[a]lthough our Supreme Court repeatedly has stated that CUTPA does not impose the requirement of a consumer relationship . . . the court also has indicated that a plaintiff must have at least some business relationship with the defendant in order to state a cause of action under CUTPA." (Citation omitted; emphasis in original.) *Id.*, 778; see also *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 157-58, 881 A.2d 937 (2005) (rejecting defendants' argument that CUTPA plaintiff is not required to allege any business relationship with defendant), cert. denied, 547 U.S. 1111, 126 S.Ct. 1913, 164 L.Ed.2d 664 (2006).

"Although the doctrine of stare decisis permits a court to overturn its own prior cases in limited circumstances, the concept of binding precedent prohibits a trial court from overturning a prior decision of an appellate court. This prohibition is necessary to accomplish the purpose of a hierarchical judicial system. A trial court is required to follow the prior decisions of an appellate court to the extent that they are applicable to the facts and issues in the case before it, and the trial court may not overturn or disregard binding precedent." (Emphasis omitted.) *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 650, 6 A.3d 60 (2010). In both *Ventres* and *Pinette*, our Supreme Court and Appellate Court, respectively, rejected the plaintiffs' assertions that they need not allege *any* business relationship with the defendants in order to bring claims against them under CUTPA.

Although this court acknowledges that, consistent with the plaintiffs' argument, the language of CUTPA itself makes no mention of a business relationship requirement,[25] this court is bound by the appellate court precedent set by *Ventres* and *Pinette*. The plaintiffs here do not contend that a consumer, competitor, or other commercial relationship exists between themselves, i.e., the Sandy Hook shooting victims, and the defendants, i.e., the manufacturers and/or sellers of the gun allegedly used in the Sandy Hook shooting. Because the plaintiffs do not allege at least *some* business relationship with the defendants, pursuant to *Ventres* and *Pinette*, they have not set forth legally sufficient violations of CUTPA. Therefore, to the extent that the plaintiffs have relied on

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[25] As further support for their argument that they are not required to allege a business relationship with the defendants in order to bring CUTPA claims, the plaintiff's cite to the portion of the decision in *Ganim v. Smith & Wesson Corp.*, *supra*, 258 Conn. 313, in which our Supreme Court stated: "We have already identified some of the directly injured parties who could presumably, without the attendant [remoteness] problems . . . remedy the harms directly caused by the defendants' conduct and thereby obtain compensation . . ." *Id.*, 359. "[T]he harm suffered by the potential other plaintiffs . . . exists at a level less removed from the alleged actions of the defendants [various handgun manufacturers, trade associations, and retail gun sellers]. They include, for example, all the homeowners in Bridgeport who have been deceived by the defendants' misleading advertising, all of the persons who have been assaulted or killed by the misuse of handguns, and all of the families of the persons who committed suicide using those handguns." *Id.* Notably, however, this language appears in the context of the court's discussion regarding the remoteness doctrine as a limitation on standing, a completely different issue than that which is before the court in the present case. In fact, *Ganim* expressly declined to consider whether a CUTPA claim is confined to consumers, competitors, and those in some business or commercial relationship with the defendants. *Id.*, 372. Accordingly, this court finds the plaintiffs' references to *Ganim* to be inapposite to the present issue.

CUTPA as a predicate statute, the plaintiffs have not set forth legally sufficient claims permitted under the predicate exception to PLCAA.

b

Alternative Arguments as to the Legal Sufficiency of Alleged CUTPA Violations

Although the foregoing analysis is dispositive of the motions to strike with regard to the CUTPA analysis, the court will consider, in the interest of completeness, the alternative arguments of the defendants regarding the legal sufficiency of the plaintiffs' CUTPA claims. Those issues are: (1) whether the type of injury alleged is sufficient under CUTPA; (2) whether the claims are time barred by CUTPA's three-year statute of limitations; (3) whether the claims are actually products liability claims and therefore cannot be asserted as CUTPA claims; and (4) whether General Statutes § 42-110c(a) exempts the defendants from CUTPA liability.

i

Type of Injury Permitted Under CUTPA

The defendants contend that the plaintiffs have not set forth legally sufficient CUTPA violations because the plaintiffs do not seek the sort of relief CUTPA affords, namely, damages for financial injury. In contrast, the plaintiffs argue that CUTPA indeed provides a remedy for personal injury and wrongful death.

Section 42-110g(a) of CUTPA provides: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages." Although the statute does not define what kinds of damages constitute "actual damages," "[c]ourts have held a number of types of economic damages recoverable as

'actual damages' pursuant to CUTPA, including lost profits, the lost value of a business, the lost benefit of a bargain, restitution and out-of-pocket losses . . . Less clear is if and to what extent damages for personal injuries or such injuries as damage to reputation can be recovered as 'actual damages' under § 42-110g(a). The legislative history of both CUTPA and the model legislation on which CUTPA was based, is silent as to whether the legislation was intended to allow recovery of personal injury damages . . . Although a number of cases in which the plaintiff sought recovery for personal injuries based on a violation of CUTPA have reached the Connecticut appellate court, in each case the appellate court denied recovery for a reason other than the inability to recover for personal injury damages under the Act. In none of these cases did the court address, or even refer to, the issue of whether damages for personal injuries are recoverable under CUTPA." (Footnotes omitted.) R. Langer, J. Morgan & D. Belt, 12 Connecticut Practice Series (2015-2016 Ed.) § 6.7, pp. 805-07 (citing various appellate court cases as examples, including *Sherwood* v. *Danbury Hospital*, 252 Conn. 193, 213-15, 746 A.2d 730 [2000]; *Haynes* v. *Yale–New Haven Hospital*, 243 Conn. 17, 34, 699 A.2d 964 [1997]; *Haesche* v. *Kissner*, 229 Conn. 213, 224, 640 A.2d 89 [1994]).

While Connecticut's trial court judges are divided on this issue, the majority of judges addressing it have held that damages for personal injuries can be recovered under CUTPA. See 12 R. Langer, J. Morgan & D. Belt, *supra*, § 6.7, p. 808 (citing *DiTeresi* v. *Stamford Health System, Inc.*, Superior Court, judicial district of Stamford–Norwalk, Docket No. CV-06-5001340–S (September 2, 2011, Tierney, J.T.R.) (denying motion to reargue previously granted motion for summary judgment in favor of defendant on plaintiff's CUTPA

claim because plaintiff failed to present evidence demonstrating that any physical injuries resulted from defendant's practices); Mola v. Home Depot USA, Superior Court, judicial district of Stamford–Norwalk, Docket No. CV-98-0167635–S (October 29, 2001, Mintz, J.); *Cole* v. *Federal Hill Dental Group, P.C.*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-99-0492391–S (July 20, 2000, Kocay, J.) (28 Conn. L. Rptr. 18); *Simms* v. *Candela*, 45 Conn.Sup. 267, 711 A.2d 778 (1998) [21 Conn. L. Rptr. 479] (plaintiff who has suffered "ascertainable loss" as a result of a CUTPA violation may recover for personal injuries where business practices are implicated); *Abbhi* v. *AMI*, Superior Court, judicial district of New Haven, Docket No. CV-96-0382195–S (June 3, 1997, Silbert, J.) (19 Conn. L. Rptr. 493) (CUTPA claim can be asserted where plaintiff suffered personal injuries).

Most notably, in *Simms* v. *Candela*, *supra*, 45 Conn.Sup. 267, the court conducted a thorough analysis of this issue, ultimately denying the defendant's motion to strike that was brought on the ground that damages for personal injury are not recoverable under CUTPA. *Id.*, 268. The court based its decision on the legislative history of CUTPA, Federal Trade Commission precedent, other cases that allowed CUTPA claims seeking damages for personal injury to proceed, the fact that the plaintiff's economic damages satisfied the "ascertainable loss" requirement, the statutory language of § 42-110g(a) allowing recovery for "actual damages," and the recognition of personal injury claims under the statutes of other jurisdictions prohibiting unfair trade practices. See *id.*, 271-76. This court finds the reasoning set forth in *Simms* to be comprehensive and persuasive,

and thus it adopts this majority view.[26] Accordingly, the court finds that the fact that the plaintiffs seek damages for personal injuries does not render their claims of CUTPA violations legally insufficient.

ii

Statute of Limitations

The defendants next argue that the CUTPA allegations are legally insufficient because the claims are barred by CUTPA's three-year statute of limitations. The plaintiffs contend that the applicable statute of limitations is, in fact, two years pursuant to General Statutes § 52-555, the wrongful death statute, and that, therefore, the motions cannot be granted on this ground.

"[O]rdinarily, [a] claim that an action is barred by the lapse of the statute of limitations must be pleaded as a special defense, not raised by a motion to strike." (Internal quotation marks omitted.) *Greco* v. *United Technologies Corp.*, 277 Conn. 337, 344 n.12, 890 A.2d 1269 (2006). "[T]here are two exceptions to that holding. Those exceptions relate to situations in which a motion to strike, filed instead of a special defense of a statute of limitations, would be permitted." *Girard* v. *Weiss*, 43 Conn.App. 397, 415, 682 A.2d 1078, cert. denied, 239 Conn. 946, 686 A.2d 121 (1996). "The first is when [t]he parties agree that the complaint sets forth all the facts pertinent to the question [of] whether the action is barred by the [s]tatute of [l]imitations and that, therefore, it is proper to raise that question by [a motion to strike] instead of by answer." (Internal quotation

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[26] The Supreme Judicial Court of Massachusetts has reached a similar conclusion with regard to an analogous Massachusetts statute. It has expressly stated "that damages due to personal injuries are recoverable under c. 93A." *Haddad v. Gonzalez*, 410 Mass. 855,868,576 N.E.2d 658 (1991).

marks omitted.) *Forbes* v. *Ballaro*, 31 Conn.App. 235, 239, 624 A.2d 389 (1993). The second exception "exists . . . when a statute gives a right of action which did not exist at common law, and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created, and not of the remedy alone." (Internal quotation marks omitted.) *Greco* v. *United Technologies Corp., supra*, 277 Conn. 345 n.12. Because CUTPA gives a right of action which did not exist at common law; see *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 159, 645 A.2d 505 (1994); and fixes the time within which the right must be enforced; General Statutes § 42-110g(f); the defendants' motions to strike on this ground fall into the second exception and are thus properly before the court.

CUTPA provides in relevant part that "[a]n action under this section may not be brought more than three years after the occurrence of a violation of this chapter." General Statutes § 42-110g(f). Here, the defendants argue that, pursuant to the amended complaint, the occurrence of the alleged CUTPA violation took place either "sometime prior to March of 2010" with regard to the Remington and Camfour defendants[27] and "[i]n March of 2010" with regard to the Riverview

[27] More specifically, paragraph 176 of the amended complaint alleges that "[s]ometime prior to March of 2010, the Bushmaster Defendants entrusted the XM15–E2S to the Camfour Defendants," and paragraph 178 alleges that "[s]ometime prior to March of 2010, the Camfour Defendants entrusted the Bushmaster XM15–E2S to the Riverview Defendants."

defendants.[28] Accordingly, the defendants argue, the three-year statute of limitations for the CUTPA claims against them expired either sometime prior to or within March of 2013 for all of the defendants. Because this action was not filed within that timeframe, the defendants reason, the claims at issue were brought well after the three-year mark from the date of the alleged CUTPA violations.

In contrast, the plaintiffs argue that the wrongful death statute, § 52-555, contains the controlling statute of limitations for purposes of their CUTPA claims. Section 52-555 provides in relevant part that "no action shall be brought to recover such damages and disbursement but within two years from the date of death . . ." As support for their assertion, the plaintiffs rely on the Superior Court case *Pellecchia* v. *Connecticut Light & Power Co.*, 52 Conn.Sup. 435, 54 A.3d 1080 (2011), aff'd in part and appeal dismissed in part, 139 Conn.App. 88, 54 A.3d 658 (2012), cert. denied, 307 Conn. 950, 60 A.3d 740 (2013).

As in the present case, the court in *Pellechia* considered the applicable statute of limitations that controls in an action involving wrongful death, stating: "The wrongful death statute . . . is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought . . . As a result, where damages for a wrongful death are sought, the pertinent statute of limitations is to be found in § 52-555 rather than the statutes of limitations for torts or negligence generally . . . This rule, however, does not bar the plaintiff from advancing alternative theories of recovery, or causes of action, pursuant to the wrongful

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[28] Paragraph 182 of the amended complaint alleges: "In March of 2010, the Riverview Defendants entrusted the Bushmaster XM15–E2S to Nancy Lanza."

death statute . . . Here, all of the plaintiff's claims against the . . . defendants seek damages arising from the death of the plaintiff's decedent in July 2006. While he has advanced different theories of liability (such as negligence, recklessness, and violation of [CUTPA]) . . . they all are subject to the two-year limitations period set forth in § 52-555." (Citations omitted; internal quotation marks omitted.) *Pellechia* v. *Connecticut Light & Power Company, supra*, 52 Conn.Sup. 445. On appeal, the Appellate Court adopted the "well reasoned decision" of the trial court and affirmed the trial court on the statute of limitations issue.[29] *Pellechia* v. *Connecticut Light & Power Company, supra*, 139 Conn.App. 90.

In the present case, the plaintiffs may advance different theories of recovery or causes of action, such as CUTPA, pursuant to the wrongful death statute. *Pellechia* makes clear, however, that those theories of liability are all subject to the two-year statute of limitations period set forth in § 52-555.[30] Moreover, the

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[29] Specifically, the Appellate Court said: "We have examined the record on appeal and considered the briefs and arguments of the parties and conclude that the judgment of the trial court should be affirmed. Because the trial court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issue . . . Any further discussion by this court would serve no useful purpose." (Citation omitted.) *Pellechia v. Connecticut Light & Power Company*, *supra*, 139 Conn.App. 90.

[30] The deaths at issue in the present case occurred on December 14, 2012. Therefore, by the normal operation of the limitations period set forth in § 52-555, the plaintiffs would have needed to commence this action within two years of that date, i.e., by December 14, 2014. Although the action was not commenced by service of process on or before that date, a review of the court documents reveals that the wrongful death claims are not time barred. General Statutes § 52-593a provides in relevant part that "a cause or right of action shall not be lost because of the passage of the time limited by law within

court finds no support for the defendants' contention that *Pellechia* holds that *both* statutes of limitations under CUTPA and the wrongful death statute must be satisfied in order for the plaintiffs to assert legally sufficient CUTPA wrongful death claims. The plaintiffs' action satisfies the two-year limitations period set forth in § 52-555. Accordingly, the plaintiffs' wrongful death claims are not barred by the applicable statute of limitations as set forth in § 52-555. With regard to the allegations of CUTPA violations contained within counts thirty-one, thirty-two, and thirty-three, however, the plaintiffs concede, and the court agrees, that these counts brought by survivor Natalie Hammond against the defendants must be stricken on the ground that § 52-555 does not apply to these claims; thus, these claims are barred by the CUTPA three-year statute of limitations.

iii

The Exclusivity Provision of the Connecticut Product Liability Act (CPLA)

The defendants contend that the plaintiffs' claims are actually product liability claims and that the CPLA contains an exclusivity provision which forecloses any other claims.[31] The plaintiffs aver that they have not

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which the action may be brought, if the process to be served is personally delivered to a state marshal, constable or other proper officer within such time and the process is served, as provided by law, within thirty days of the delivery . . ." As the process was delivered to the marshal within the two-year period and the marshal served process on the defendants within thirty days of the delivery, the wrongful death claims are not time barred.

[31] The defendants additionally argue that PLCAA prohibits a product liability action where the discharge of the firearm was the result of a volitional criminal act. The plaintiff does not claim to be asserting a product liability cause of action. PLCAA specifically exempts "an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the

alleged a product liability claim because their arguments for liability are not based on a defective product, the marketing of a defective product, or the failure to warn about such a product.

"The exclusivity provision of the product liability act provides: 'A product liability claim . . . may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product.' General Statutes § 52-572n(a)." (Footnotes omitted.) *Gerrity* v. *R. J. Reynolds Tobacco Co.*, *supra*, 263 Conn. 125-26. Therefore, if the plaintiffs' claims sound in products liability, they may not be brought pursuant to CUTPA.

In Connecticut, "the legislature defined a product liability claim to include all claims or actions brought for personal injury, death or property damage caused by [an] allegedly *defective* product. General Statutes § 52-572m(b). The legislature also provided that the damages are caused by the defective product if they arise from the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. General Statutes § 52-572m(b). In addition, a product liability claim is defined broadly to include, but not be

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product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage"; (emphasis added) 15 U.S.C. § 7903(A) (5)(v) (2012); from the definition of a qualified, and therefore prohibited, civil liability action. In the present case, "[i]t is uncontroverted that a third party discharged the [weapon], during the commission of a criminal act." *Jefferies v. District of Columbia*, 916 F.Sup.2d 42, 46 (2013). Accordingly, regardless of whether the plaintiffs have alleged a product liability action, this exception does not apply.

limited to, all actions based on [s]trict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent. General Statutes § 52-572m(b). Finally, the legislature defined [h]arm for purposes of the act to include damage to property, including the product itself, and personal injuries including wrongful death. General Statutes § 52-572m(d). These definitions must be read together, with the understanding that the [liability act] was designed in part to codify the common law of product liability, and in part to resolve, by legislative compromise, certain issues among the groups interested in the area of product liability. The [liability act], however, was not designed to eliminate claims that previously were understood to be outside the traditional scope of a claim for liability based on a defective product. Given this contextual framework, [the Supreme Court] conclude[d] that a product liability claim under the [liability] act is one that seeks to recover damages for personal injuries, including wrongful death, or for property damages, including damage to the product itself, caused by the *defective* product." (Emphasis added; internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P. C.*, 278 Conn. 305, 324-25, 898 A.2d 777 (2006), quoting *Gerrity* v. *R. J. Reynolds Tobacco Co.*, *supra*, 263 Conn. 128.

"A product may be defective due to a flaw in the manufacturing process, a design defect or because of inadequate warnings or instructions." *Vitanza* v. *Upjohn Co.*, 257 Conn. 365, 373, 778 A.2d 829 (2001). As Justice Zarella has observed, "[c]onsistent with our product liability law, the Restatement (Third) recognizes three distinct categories of product defect claims: manufacturing defects, design defects, and marketing

defects, also called a failure to warn." *Izzarelli* v. *R. J. Reynolds Tobacco Co.*, 321 Conn. 172, 214, 136 A.3d 1232 (2016) (Zarella, J., concurring). Reading these definitions together, the court concludes that "a product liability claim under the [CPLA] is one that seeks to recover damages for personal injuries, including wrongful death, or for property damages, including damage to the product itself, caused by"; (internal quotation marks omitted) *Hurley* v. *Heart Physicians, P. C.*, *supra*, 278 Conn. 325; "a flaw in the [product's] manufacturing process, a design defect or because of inadequate warnings or instructions." Vitanza v. Upjohn Co., supra, 257 Conn. 373. "Inadequate warnings or instructions" encompasses "failure to warn" and "marketing defects." *Izzarelli* v. *R.J. Reynolds Tobacco Co.*, *supra*, 214-15 (Zarella, J., concurring); see also Restatement (Third), Torts, Products Liability § 2 (1998).

In the present case, the defendants argue that the plaintiffs seek wrongful death and personal injury damages allegedly resulting from product design. "To prevail on a design defect claim a plaintiff must prove that the product is unreasonably dangerous . . . Unreasonably dangerous is defined under Connecticut law using the consumer expectation standard, which provides that the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." (Citation omitted; internal quotation marks omitted.) *Fraser* v. *Wyeth, Inc.*, 857 F.Sup.2d 244, 256 (D.Conn. 2012). The plaintiffs are not claiming that the defendants are liable because the firearm is unreasonably dangerous and state "indeed, it is an ideally dangerous product for a large consumer base (that is, military and law enforcement personnel)."

The defendants also argue that the plaintiffs seek wrongful death and personal injury damages allegedly resulting from wrongful marketing. As stated above, defective marketing is synonymous with inadequate warnings or instructions. "[A] product may be defective because a manufacturer or seller failed to warn of the product's unreasonably dangerous propensities . . . Under such circumstances, the failure to warn, by itself, constitutes a defect." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Sharp* v. *Wyatt, Inc.*, 31 Conn.App. 824, 833, 627 A.2d 1347 (1993), aff'd, 230 Conn. 12, 644 A.2d 871 (1994). Again, the plaintiffs have not alleged liability based on a product defect. Furthermore, the plaintiffs have not alleged any facts regarding the defendants providing, or failing to provide, warnings or instructions.

In sum, construing the complaint in the light most favorable to sustaining its legal sufficiency, the plaintiffs have not alleged that the product was in any way defective and have therefore not alleged a product liability claim. For this reason, the plaintiffs' CUTPA claims are not barred by the CPLA's exclusivity provision.

iv

General Statutes § 42-110c(a): CUTPA's Exemption Provision

Finally, the defendants argue that § 42-110c(a)(1) exempts them from CUTPA liability. Section 42-110c(a) provides in relevant part: "Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States . . ." The court does not grant the defendants' motions to strike on this basis. First, as the

plaintiffs contend, the applicability of this provision generally should be raised by way of a special defense or a motion for summary judgment, rather than a motion to strike. See *Gonzalez* v. *Church Street New Haven, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-14-6050201 (November 2, 2015, Blue, J.) (61 Conn. L. Rptr. 169) (CUTPA's exemption provision is affirmative defense that must be alleged in pleadings and proved at trial or raised in motion for summary judgment, not motion to strike). Second, none of the defendants has adequately briefed the issue of whether this exemption applies to the present case, and the court, therefore, will not address it. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) (court is "not required to review issues that have been improperly presented . . . through an inadequate brief [internal quotation marks omitted]). Accordingly, the court does not grant the motions to strike on the ground that CUTPA's governmental exemption provision bars the action.

## III
## CONCLUSION

Congress, through the Protection of Lawful Commerce in Arms Act (PLCAA), has broadly prohibited lawsuits "against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) and § 7902(a) (2012). The present case seeks damages for harms, including the deaths of the plaintiffs' decedents, that were caused solely by the criminal misuse of a weapon by Adam Lanza. Accordingly, this action falls squarely within the broad immunity provided by PLCAA.

Although PLCAA provides a narrow exception under which plaintiffs may maintain an action for negligent entrustment of a firearm, the allegations in the present case do not fit within the common-law tort of negligent entrustment under well-established Connecticut law, nor do they come within PLCAA's definition of negligent entrustment. Furthermore, the plaintiffs cannot avail themselves of the Connecticut Unfair Trade Practices Act (CUTPA) to bring this action within PLCAA's exception allowing lawsuits for violation of a state statute applicable to the sale or marketing of firearms. A plaintiff under CUTPA must allege some kind of consumer, competitor, or other commercial relationship with a defendant, and the plaintiffs here have alleged no such relationship.

For all of the foregoing reasons, the court grants in their entirety the defendants' motions to strike the amended complaint.[32]

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[32] The court is aware that one of the defendants, Riverview Sales, Inc., has filed a petition for bankruptcy. Pursuant to the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, this action is automatically stayed with respect to that defendant. Accordingly, this decision does not apply with regard to Riverview Sales, Inc. Any and all references to Riverview Sales, Inc., and "the Riverview defendants" in this memorandum, therefore, are included for the sake of clarity and should not be construed as applying this decision to the claims against Riverview Sales, Inc., in any way. See *Ellis v. Consolidated Diesel Electric Corp.*, 894 F.2d 371, 373 (10th Cir. 1990) ("[t]he operation of the stay should not depend on whether the . . . court finds for or against the debtor" [emphasis in original]); see also *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 528 (2d Cir. 1994) (bankruptcy stay applies to judicial decision making by court, but not ministerial acts performed by clerk following completion of judicial function).

**APPENDIX C**

**SUPREME COURT**
**STATE OF CONNECTICUT**

SC 19832

SC 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL.

v.

BUSHMASTER FIREARMS INTERNATIONAL, LLC AKA FREEDOM GROUP, INC. AKA REMINGTON OUTDOOR CO., INC. ET AL.

May 1, 2019

**ORDERED**

THE MOTION OF THE DEFENDANTS REMINGTON ARMS COMPANY LLC AND REMINGTON OUTDOOR COMPANY, INC., FILED APRIL 4, 2019, TO STAY PENDING DECISION BY THE UNITED STATES SUPREME COURT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED GRANTED UNTIL THE EXPIRATION OF THE TIME TO PETITION TO THE UNITED STATES SUPREME COURT OR, IF A PETITION IS FILED, UNTIL THAT COURT HAS TAKEN ACTION IN THIS CASE, EITHER BY A DENIAL OF THE PETITION FOR CERTIORARI

OR, IF APPLICABLE, BY A DECISION ON THE MERITS.

BY THE COURT,
/S/
L. JEANNE DULLEA
ASSISTANT CLERK-APPELLATE

NOTICE SENT: MAY 2, 2019
COUNSEL OF RECORD
HON. BARBARA BELLIS
CLERK, SUPERIOR COURT FBT-CV15-6048103S
180336

## APPENDIX D

15 U.S.C.A. § 7901

§ 7901. Findings; purposes

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities

guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the

Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

15 U.S.C.A. § 7902

## § 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

15 U.S.C.A. § 7903

§ 7903. Definitions

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated

a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product,

when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the

Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means--

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

C.G.S.A. § 42-110b

§ 42-110b. Unfair trade practices prohibited. Legislative intent

(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

* * *